EXHIBIT F

Memorandum of Law

June, 1997

Dockets.Justia.com

June 1997
Memo

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| In re: HOLOCAUST VICTIM ASSETS LITIGATION | Master Docket No. CV-96-4849 (ERK) (MDG) Consolidated with CV-96-5161 and CV-97-461 |

Memorandum of Law Submitted by Burt Neuborne

Introductory Statement

I am serving, with the consent of the Court, in a pro bono capacity as co-counsel in each of the three consolidated cases herein, and as a legal resource for the more than 80,000 persons who have contacted counsel in connection with the recovery of assets allegedly deposited in a Swiss bank on the eve of the Holocaust. I submit this memorandum of law to respond to several expert submissions filed by legal academics retained by defendants.[1]

The submissions of several academic experts retained by defendants go beyond the proper scope of expert commentary defined by the Federal Rules of Evidence. In fact, they are extended legal briefs couched as the ostensibly neutral opinion of an academic expert. Rather than move to strike the improper expert affirmations, however, plaintiffs have resolved to rebut them. Instead

[1] I do not hold myself out as an expert in every aspect of the cases before the Court. I am, however, an experienced academic lawyer, with a record of scholarship and teaching in the area of judicial protection of human rights. My academic qualifications are described in an Appendix, supra, at p.79.

of presenting plaintiffs' rebuttal in the form of an expert counter-affirmation that would merely compound defendants' misuse of the genre, plaintiffs submit this rebuttal in the form of an advocate's memorandum of law to reflect the fact that what is at issue in this case is not the discovery of a neutral truth known only to academic experts, but the resolution of a contested legal issue. We deal here in legal advocacy; not academic expertise.

The Nature of Plaintiffs' Claims

Plaintiffs present three classic legal theories entitling them to relief against defendant banks.

1. The Deposited Assets Claim

First, thirteen named-plaintiffs allege that close family members deposited assets for safekeeping in one or another of the defendant banks on the eve of the Holocaust which have never been returned. Plaintiffs demand return of the "deposited assets", together with appropriate compensatory and punitive damages for defendants' obstructive and evasive behavior in seeking to prevent return of the deposited assets for more than 50 years.

2. The Constructive Trust Claim

Second, plaintiffs allege that the unique circumstances surrounding the solicitation, receipt, and continued retention of assets deposited by Jews in defendant banks on the eve of the Holocaust impress the assets with a constructive trust. Plaintiffs allege that defendant banks violated their fiduciary duties as constructive trustees by failing to take affirmative steps to return the assets in the years following the Second World War; by failing to keep and maintain adequate records of the deposited assets; and by allowing themselves to be placed in a blatant conflict of interest situation in which they continue to profit financially by failing to identify the true owners.

3. The Looted Assets/Slave Labor Claims

Third, plaintiffs allege that the defendant banks knowingly and repeatedly acted as receivers of stolen property on behalf of officials of the Third Reich in connection with assets looted from Jews under conditions amounting to crimes against humanity, and genocide; and that the defendant banks knowingly and repeatedly trafficked in goods produced by Jewish slave labor with knowledge that they were trafficking in the fruits of war crimes. Plaintiffs demand disgorgement of any profits unjustly earned by defendant banks by knowingly assisting Nazis in the consummation of crimes against humanity, together with the return of any assets (or the value thereof) for which the banks acted as knowing receivers of stolen property.

The Factual Matrix Underlying Plaintiffs' Claims[2]

From 1933-45, Nazi Germany perpetrated unspeakable acts of barbarity against the Jews of Europe. When the killing finally stopped in 1945, six million Jewish men, women and children had been murdered, their property ruthlessly looted, their bodies wracked by slave labor. Even before the systematic killing started, beginning in 1933, the Nazi regime embarked on policy of anti-Semitism designed to confiscate property owned by German and Austrian Jews, and to drive them from positions of influence and respect. As the Nazi vise tightened, Jews throughout Europe sought a safe haven for their property in the hope that the Nazi nightmare would pass. Nazi Germany responded by making it a capital offense for a Jew to transmit wealth abroad without government permission.

---

[2] Plaintiffs' factual assertions are drawn from the historical record developed by the Nuremberg Tribunals, and from published historical sources. The factual assertions are particularized in plaintiffs' complaints, and in the Supplemental Recitation of Facts lodged with the Court. See generally U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II (1997)(the Eizenstat Report); United States Holocaust Memorial Museum, In Pursuit of Justice: Examining the Evidence of the Holocaust (1996).

In 1934, the Swiss banking community, motivated in part by humanitarian impulses, and in part by economic opportunism, sought to make Swiss banks more attractive to Jewish targets of Nazi persecution by enacting comprehensive bank secrecy laws designed to shield the identities of Jewish depositors from the Gestapo. As Gestapo surveillance intensified, Swiss banks permitted and encouraged Jewish depositors to open accounts in the name of nominees, and rapidly merged Jewish deposits into consolidated custodial accounts, rendering tracing and identification even more difficult.

Throughout the 1930's, European Jews, increasingly desperate about their fate under the Third Reich but unable to flee because of widespread immigration quotas, poured enormous sums into defendant banks[3], lured by promises of confidentiality and trustworthiness. Only a careful review of Swiss bank deposits from 1933-45, especially deposits from abroad, can measure the full magnitude of the Jewish deposits. Plaintiffs have assembled the resources to conduct such a review. In addition, economists and historians retained by plaintiffs, using public records and newly available archival data, are prepared to reconstruct the flow of funds from the European Jewish community into Swiss banks, and to place a dollar value on the deposits. Plaintiffs are confident that a combination of vigorous discovery aimed at identifying Swiss bank deposits from abroad during the years in question, and careful economic reconstruction of the flow of funds into Switzerland, can produce an accurate figure representing the total value of funds deposited in Swiss banks by Jews on the eve of the Holocaust. At this point, plaintiffs' experts have determined that more than 100 million dollars was deposited by Jews in Swiss banks between 1933-45.[4]

---

[3] The three defendant banks are the surviving entities representing more than 75% of the private Swiss banks operating in the years in question

As Europe became engulfed in war, the Holocaust began. Nazi Germany engaged in atrocious crimes against humanity, including the systematic looting of the property of Jews, both as a prelude to their shipment to extermination camps, and in the ghoulish aftermath of their mass murder.

In order to transform looted Jewish property into negotiable assets usable for the German war effort, it was necessary to find an international receiver of stolen property willing to fence the looted assets by laundering them into currency that could be used to purchase war material. Swiss banks knowingly assumed that role.

The very Swiss banks, including the three defendant banks and their predecessor entities, that had attracted substantial deposits from Jews by promising them bank secrecy and loyalty, willingly cooperated with the Nazis by knowingly receiving property looted from Jews, and laundering it into Swiss francs. Plaintiffs will prove that defendant banks were paid substantial commissions by the Nazis for knowingly laundering vast quantities of looted Jewish assets.

As Nazi Germany sensed defeat, it attempted to shore up its war machine by the use of

---

[4] When interest and currency fluctuations are taken into account, plaintiffs' experts estimate the current value of the Jewish deposits at substantially in excess of one billion dollars.

Jewish slave labor. Increasingly, goods produced by slave labor were sold by the Nazis to generate the foreign exchange needed to finance the German war effort. The defendant banks, and their predecessor entities, having knowingly laundered the looted assets of Jews, then knowingly provided Nazi Germany with Swiss francs in return for goods produced by Jewish slave labor. Once again, plaintiffs will demonstrate that Swiss banks, including the three defendant banks and their predecessors, were paid enormous sums by the Nazis for their complicity in knowingly financing the importation into Switzerland of goods produced by Jewish slave labor. Plaintiffs' experts have determined that Swiss banks earned more than 75 million dollars by knowingly trafficking in the fruits of Nazi war crimes.[5]

With the collapse of Nazi Germany and the liberation of the Nazi death camps in 1945, and with European Jewry decimated and traumatized by the Holocaust, survivors of the death camps, and the families of those who failed to survive, approached the defendant banks, and their predecessors, in an effort to trace and recover sums deposited by Jews prior to the Holocaust. In one of the tragic moral perversions of recent times, Swiss bankers, including the defendant banks and their predecessors, relied upon the 1934 Swiss bank secrecy laws to frustrate efforts to trace the Jewish deposits; the same bank secrecy laws that had been used to induce Jews to deposit assets in Swiss banks in the first place.

Under the Washington Accords of 1946, the Swiss government acknowledged that retention in Swiss banks of gold looted by the Nazis from conquered governments would violate international law. Accordingly, the Swiss government promised to return gold held by Swiss banks that had been looted by Nazis from conquered nations. The Swiss never carried out their promises under the Washington Accords.

---

[5] The current value of the profits earned by defendant banks as the knowing accomplices to Nazi war crimes exceeds one billion dollars.

In 1962, the Swiss government made the same promise with respect to assets deposited by Jews, acknowledging that it would be unconscionable for Swiss banks to retain the deposited assets. But, as with the Washington Accords, the Swiss never kept their promise. Of the vast sums that plaintiffs will prove flowed from Jews into Swiss banks in the years before the Holocaust, only a pittance has ever been acknowledged. The vast bulk of the assets have simply disappeared into the Swiss banking system, constituting the single most egregious example of unjust enrichment in banking history.

Simply put, this case is an effort by survivors of the Holocaust and close family members of those who failed to survive, many thousands of whom reside in New York, to use the power of an American court to secure full restitution of the assets deposited for safekeeping in defendant banks on the eve of the Holocaust, and to force defendant banks to disgorge the unjust profits they earned by knowingly participating in the commission of war crimes. Twice in recent memory, in the 1946 Washington Accords, and the 1962 Swiss declaration, the Swiss government promised the international community that assets belonging to conquered nations, and to individual victims of Nazi persecution, would be returned. On each occasion the Swiss banking community reneged on the promise. Plaintiffs believe that if, at long last, justice is to be done, it must be in this Court.

B. The Parties

1. The Swiss Bank Defendants

The three bank defendants, Credit Suisse, Union Bank of Switzerland, and Swiss Bank

Corporation, are the three largest banks in Switzerland. Each carries on extensive business operations in the United States, and the State of New York. By merger, acquisition, or transfer, plaintiffs estimate that the three defendant banks (and their predecessors) represent approximately 75% of the private banks operating in Switzerland between 1933-45, and an even higher percentage of the private Swiss banks likely to have received deposits from abroad during the period in question.

Defendant, Swiss Bankers Association, is the trade association of the Swiss banking industry, representing all Swiss banks. The Swiss Bankers Association lobbies assiduously in the United States, appearing before the Congress of the United States to advance the interests of the Swiss banking industry.

If discovery reveals additional Swiss banks that should be made parties herein, they will be added as parties-defendant.

2. The Individual Plaintiffs

The individual plaintiffs in these three consolidated actions are thirteen individuals who are representative of the more than 80,000 persons who have contacted counsel alleging that a family member deposited funds in a Swiss bank prior to the Holocaust, and that efforts to trace and retrieve the funds have been unsuccessful. While four of the individual plaintiffs[6] are able to identify the particular defendant bank in which a deposit was made, many claimants, including nine named-plaintiffs[7], are unable, without the assistance of discovery, to identify the specific defendant bank in which a deposit was made.

---

[6] Gizella Weisshaus; Rudolfine Schlinger; Estelle Sapir; and Jacob Friedman.

[7] Lewis Salton; Charles Sonabend, Elisabeth Trilling-Grotch; David Burchowicz; Joshua Lustman; Moe Wiedler; Erwin Hauer; Irene

3. The Institutional Plaintiffs

The institutional plaintiff, World Council of Orthodox Jewish Communities, Inc., (World Council) is an association of religious communities, originally centered in Germany and Eastern Europe, that suffered substantial persecution and looting at the hands of the Nazis. World Council seeks the return of looted communal property that was knowingly fenced by defendant banks, and other appropriate damages.

4. The Putative Plaintiff-Classes

Plaintiffs intend to move for class certification at the appropriate time. Plaintiffs anticipate at least three sub-classes:

The Deposited Assets/ Constructive Trust Class

> (1) a class of persons seeking to recover assets deposited by Jews in defendant banks, or their predecessors between 1933-45, but which have not been returned to their true owners. Such a "deposited assets" class will seek specific restitution of deposited funds, an order of disgorgement requiring defendants to disgorge all deposits made by Jews from 1933-45 which have not been returned to their true owners, and appropriate damages from defendants for violating their duties as constructive trustees. The named representatives of the "deposited assets" class will be individuals who allege that between 1933-45, relatives deposited funds in Swiss banks that have never been returned, as well as representative default plaintiffs acting on behalf of those who failed to survive and whose information died with them;

The Looted Assets Class

> (2) a class of persons seeking to recover assets looted by the Nazis and knowingly laundered into Swiss francs by defendant banks on behalf of the Nazis. Such a "looted assets" class will seek

---

Zarkowski; and Lillie Ryba.

restitution, if possible, of specific looted assets or their current value, and an order of disgorgement requiring defendants to disgorge any profits earned by knowingly trafficking in looted assets. The named representatives of the "looted assets" class are persons from whom assets were looted by the Nazis, or their survivors, together with appropriate default plaintiffs representing those who did not survive; and

The Slave Labor Class

(3) a class of persons seeking to recover profits earned by defendants by knowingly acting as the financial conduit on behalf of the Nazis for the importation and sale of goods produced by slave labor. Such a "slave labor" class will seek an order of disgorgement requiring defendants to disgorge any profits earned by knowingly trafficking in goods produced by slave labor. The named representatives of the "slave labor" class are persons who were forced to perform slave labor by the Nazis, or their survivors, together with appropriate plaintiffs representing those who did not survive.

## Argument

Some things are a good deal simpler than Swiss bankers make them appear. Despite more than four hundred pages of legal memoranda, and hundreds of additional pages of supporting affidavits, the legal issues raised by defendants' gargantuan motions to dismiss, delay, or transfer these cases are relatively uncomplicated, and are easily resolvable in favor of the plaintiffs.

Plaintiffs' claims for relief spring from the oldest and most widely shared idea in our conception of justice - the prevention of unjust enrichment. Western legal thought begins with Aristotle's injunction that the primary function of corrective justice is the avoidance of unjust enrichment. Aristotle, Nichomachean Ethics, bk v, ch. 4 (Richard McKean ed. 1941)("The judge tries to equalize things by means of the penalty, taking away the gain of the assailant...The just consists of having an equal amount before and after the transaction.").

The Restatement of Restitution, (1937) reflects the extent to which the common law has been shaped by Aristotle's principles of corrective justice.[8] Section 1 of the Restatement states:

> "A person who is unjustly enriched at the expense of another is required to make restitution to the other".

Section 3 states:

> "A person is not entitled to profit by his own wrong at the expense of another".[9]

Continental legal systems, especially systems like Switzerland's that are derived from Germano-Roman roots, are also deeply imbued with a commitment to preventing unjust enrichment.[10] Indeed, the Swiss Code of Obligations recognizes prevention of unjust enrichment as a principal function of justice, along with the enforcement of contract and tort remedies. Swiss Code of Obligations, para 62-68.

---

[8] See, eg., Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277 (1989); Coleman, The Practice of Corrective Justice, 37 Ariz. L. Rev. 15 (1995).

[9] In addition to the Restatement of Restitution (1937), the principal scholarly works on the common law principle of unjust enrichment are George E. Palmer, The Law of Restitution (1978); and Goff & Jones, The Law of Restitution (1986). The authors of the Restatement, Austin Scott and Warren Seavey, wrote an important contemporaneous commentary. Seavey & Scott, Restitution, 54 Law Q. Rev. 29, 32 (1938)("A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust."). See also John P. Dawson, Unjust Enrichment: A Comparative Analysis (1951).

[10] The unjust enrichment principle was the animating force behind the Roman action of "condiction", as well as the action for negotiorum gestio. The history of unjust enrichment in the Continental legal world is traced in Dawson, Unjust Enrichment: A Comparative Analysis, supra at 41-60. Its role in Swiss law is briefly described by Professor Tercier at para. 60-66 of his

Embedded, as they are, in such a universally recognized maxim of justice, plaintiffs' claims give rise to numerous legal theories upon which relief can be granted within the meaning of Rule 12(b)(6). Rather than parse each theory, I will describe three over-arching duties owed by the defendant banks to plaintiffs, and describe how each of the duties is legally enforceable in contract, tort, and prevention of unjust enrichment under the laws of Switzerland and New York.

## I.
## UNDER THE LAWS OF SWITZERLAND AND NEW YORK, DEFENDANTS ARE LEGALLY OBLIGATED TO RETURN THE "DEPOSITED ASSETS" TO THEIR RIGHTFUL OWNERS

Defendants concede that they are under a legally enforceable duty to return all assets deposited by Jews on the eve of the Holocaust. Whether one couches the banks' duty to return "deposited assets" as contractual[11], as sounding in tort[12], or as a classic exercise in restitution and

affirmation in support of defendants, which actually provides significant support for plaintiffs' substantive claims under Swiss law.

[11]The contract claim would arise out the express or implied nature of the agreement entered into between the banks and their depositors.

[12] Wrongful retention of the deposited assets by defendant banks would be deemed a conversion under the common law, or a violation of Article 41 of the Swiss Code of Obligations. In both systems, if adequate relief can be obtained pursuant to contract, no need exists to resort to tort. With the abolition of the forms of action, however, it is not necessary to distinguish between contract or tort in order to respond to a Rule 12(b)(6) motion. It is enough to establish that recovery may be had under one

disgorgement designed to prevent unjust enrichment[13], all parties are in agreement that defendants may not lawfully retain the so-called "deposited assets". Moreover, it matters not whether one applies Swiss law, or New York law to plaintiffs' claim for return of "deposited assets". All legal roads lead to the same conclusion: It would constitute unlawful unjust enrichment for the defendant banks to retain any "deposited assets".

A. Defendants Concede That Plaintiffs Who Are Able to Identify a Specific Bank State a Valid Claim for Return of the Deposited Assets

As even defendants' expert, Professor Tercier, concedes, four named-plaintiffs, Gizella

---

theory or the other. See Rule 2 FRCP.

[xx] Under both the common law of New York, and the Swiss Code of Obligations, if neither contract nor tort can do complete justice, a court possesses wide discretionary power to forge an equitable remedy (often characterized as specific restitution or disgorgement), to prevent unjust enrichment. For an early recognition that unjust enrichment principles may supplement inadequate contract or tort remedies, see Hambly v. Trott 98 Eng. Rep. 1136 (K.B. 1776)(plaintiff permitted to "waive the tort and sue in assumpsit" to prevent unjust enrichment).

For examples of specific restitution, see Restatement of Restitution, section 4, comments c and d; Id at section 128. For examples of disgorgement designed to prevent unjust enrichment, see Snepp v. United States, 444 U.S. 507, 515 (1980)(ordering disgorgement of profits earned by breaching contract); Zacchini v. Scripp-Howard Broadcasting Company, 433 U.S. 562 (1977)(disgorgement appropriate to prevent wrongdoer from profiting from wrongful act); Simon & Schuster, Inc. v. Members of New York Crime Control Board, 502 U.S. 105 (1991)(approving use of disgorgement to prevent wrongdoer from profiting from crime, but invalidating disgorgement when applied solely to profits earned by speech); Moser v. Darrow, 341 U.S. 267 (1950)(breach of fiduciary duty requires disgorgement of unjust profits); Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910 (1969)(ordering disgorgement of profits earned by insider trading).

Weisshaus, Rudolfine Schlinger, Estelle Sapir, and Jacob Friedman, satisfy defendants' insupportably narrow definition of a proper plaintiff.[14] Thus, defendants concede that their Rule 12(b)(6) motion directed against plaintiffs' claim for the return of "deposited assets" must be denied, leaving at a minimum, four named-plaintiffs eligible to act as putative class representatives for the class of "deposited assets/constructive trust" claimants.

B. Plaintiffs Who Are Unable to Identify a Specific Bank May, Pursuant to Rule 20(a) FRCP, Join Defendant Banks as "Alternative" Defendants

The parties disagree over whether persons who allege that deposits were made in a Swiss bank, but who are currently unable in the absence of discovery to identify the precise bank, state a judicially cognizable claim for relief in an American court.[15]

Defendants, relying on the expert opinion of Professor Tercier, argue that, as a matter of Swiss contract law, unless a plaintiff identifies the specific bank in which a family member allegedly made a deposit, the action fails to state a claim under Swiss law. Tercier Affirmation, para. 18; 66; and 71.[16] Moreover, under a provision of the Swiss Code of Obligations that must be numbered Catch-22, Professor Tercier opines that no mechanism exists under Swiss law to assist such a luckless plaintiff to learn the information needed to file a valid claim in a Swiss court.[17] Tercier Affirmation, para. 22-23.

---

[14] According to defendants, the only proper plaintiff is an individual who asserts a Swiss contract claim against a specified bank.

[15] Nine named plaintiffs fall into this category.

[16] Although I am not an expert on Swiss law, I feel justified in commenting on Professor Tercier's affirmation because it raises important federal procedural issues with which I have substantial familiarity. In fact, the picture of Swiss law painted by Professor Tercier, which I accept solely for the purposes of this motion, actually supports plaintiffs' claims for relief.

But this case is not pending in a Swiss court. Even if Swiss substantive law is eventually deemed to apply to this case[18], the procedural law of the forum codified in the Federal Rules of

---

[17] While I am prepared to take Professor Tercier at his word that there is no mechanism under Swiss law that would permit numerous plaintiffs to seek judicial relief in a Swiss court solely because they cannot identify the precise bank into which funds were deposited, his description of Swiss law seems extremely harsh. It seems curious that a legal system like Switzerland's, with such a well-developed set of norms prohibiting unjust enrichment, would reach such a palpably unjust result.

There is, of course, a careful ambiguity in Professor Tercier's affirmation. At Para. 11, he states:

> Claims against a (large) number of defendants without specifying the defendant against which the claim is directed, will not be successful in a Swiss court.

Professor Tercier carefully refrains from opining on whether three banks would constitute a "(large) number of defendants" under Swiss law.

[18] Since subject matter jurisdiction over plaintiffs' Swiss and New York-based claims for the return of the so-called "deposited assets" is granted by 28 U.S.C. section 1332, New York law, including New York conflicts law, must be applied under Erie v. Tompkins, 304 U.S. 64 (1938) and Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) to outcome-determinative issues. See Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114 (2d Cir. 1994).

Plaintiffs believe that New York law should govern this case. However, since defendants' motions to dismiss must be denied under both New York and/or Swiss law, there is no need to attempt to decide the complex choice of law issues at this time.

Civil Procedure unquestionably governs procedural matters such as pleading, discovery, class action, and the scope and availability of equitable remedies. See Restatement (Second) of Conflicts of Law (1971) at secs. 122-143, especially sec. 127. Hanna v Plumer, 380 U.S. 460 (1965)(law of forum governs pleading and mode of service); Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (law of forum governs the nature and availability of equitable remedies). Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987)(discovery involving foreign defendants governed by FRCP, not Hague Convention or law of defendant's domicile).

Indeed, Professor Tercier candidly concedes that since the statute of limitations herein is a procedural matter, it will be governed by forum law, even if Swiss law governs the substance. - Tercier Affirmation, para 59.2.

If one applies the literal language of Rule 20(a) of the Federal Rules of Civil Procedure[19] to the nine named plaintiffs who allege that a deposit was made into a Swiss bank, but who are unable to identify the precise bank at this time, Rule 20(a) FRCP explicitly permits such a plaintiff to join one or more "alternative" defendant banks, and to use the mechanism of discovery to ascertain the precise bank into which a deposit was made. Where, as here, the three named defendant banks represent, through merger or succession, approximately 75% of the private Swiss banks operating during the years in question, the use of Rule 20(a) is particularly appropriate.

---

[19] Rule 20(a) states, in pertinent part:

> All persons...may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction and occurrence or series of transactions and occurrences and if any question of law or fact common to all defendants will arise in the action. A...defendant need not be interested in...defending against all the relief demanded. Judgment may be given...against one or more defendants according to their respective liabilities. (emphasis added).

In words that could not describe this case more clearly, Wright, Miller & Kane's Treatise on Federal Practice and Procedure states at sec. 1654:

> The need for alternative joinder of defendants typically arises when the substance of plaintiff's claim indicates that he is entitled to relief from someone, but he does not know which of two or more defendants is liable under the circumstances set forth in the complaint.

See, eg., Block Indust. v. DHJ, Indust., 495 F.2d 256 (8th Cir. 1974); Texas Employers' Ins. Ass'n v. Felt, 150 F2d 227 (5th Cir. 1945).

Thus, when one combines the substantive law of Switzerland, as described by Professor Tercier, with the procedural law of the forum, which Professor Tercier concedes will govern procedural matters such as pleading and discovery, all thirteen named plaintiffs state valid claims for the return of deposited assets, even in the eyes of defendants.

C. Defendants Are Collectively Responsible for the Return of All "Deposited Assets"

Defendants' assertion that no claim for deposited assets can go forward unless, prior to discovery, a plaintiff identifies a specific bank founders on two additional grounds. If, as plaintiffs allege, the defendant banks acted in concert with one another, as well as with the remaining Swiss banks, in failing to return the deposited assets, and in repeatedly breaching their fiduciary duties as constructive trustees, each defendant will be jointly and severally liable for the collective refusal to return the funds, rendering it unnecessary, especially at this early stage of the proceedings, for each plaintiff to single out a particular bank as defendant. See Hall v. E.I. du Pont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972); Bichler v. Eli Lilly & Co., 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982)(recognizing that concerted action can give rise to collective liability).

Moreover, even if, after discovery, it proves impossible to match a particular plaintiff with a particular bank because defendants have destroyed or failed to maintain adequate records, as long as a liability nexus exists between a class of plaintiffs and a group of defendants, proportionate liability for the deposited assets may be assessed on the basis of defendants' market share. See Hymowitz v. Eli Lilly & Co., 73 NY2d 487, 541 NYS2d 941, 539 NE2d 1069, cert. denied, 493 U.S. 944 (1989)(recognizing proportionate liability based on market share); Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924 (1980), cert. denied, 449 U.S. 912 (1980).[20]

It is, of course, premature to speculate about the existence of "concerted action" liability, or "market share" liability, since no discovery has taken place. Ideally, discovery will make it unnecessary to consider theories of collective liability. What is clear, however, is that defendants may not, under the procedural law of the forum, use Catch-22 logic to require dismissal of plaintiffs' claims before they are given an opportunity, through discovery, to determine the name of the Swiss bank into which their relatives deposited assets in an effort to safeguard them from the Nazis.

---

[20] If discovery reveals that defendants have engaged in a common plan to destroy or fail to maintain adequate records, the defendant banks will be jointly and severally liable, as well, for breaching their duties as constructive trustees.

Moreover, while it is too early in this action to consider whether defendants may be liable under theories of collective liability, plaintiffs have alleged facts that would justify imposing collective liability on each defendant under a theory of "concerted action", or "market share". See Hamilton v. ACCU-TEK, 935 F. Supp. 1307, 1327-31 (E.D.N.Y. 1996)(reviewing theories of collective liability).

Thus, in light of Professor Tercier's assessment of Swiss law, defendants' Rule 12(b)(6) motion must be denied against the four named-plaintiffs who have identified a specific bank as a defendant. Moreover, whatever substantive law is ultimately deemed to govern this case, Rule 20(a) FRCP, which governs pleading and discovery in this forum, forbids dismissal of the claims of the nine remaining named-plaintiffs who have alleged that a deposit was made in a Swiss bank, but who cannot identify the precise bank without the assistance of reasonable discovery.

## II.
## DEFENDANTS HOLD THE DEPOSITED ASSETS IN CONSTRUCTIVE TRUST. AS CONSTRUCTIVE TRUSTEES, DEFENDANTS ARE: (1) OBLIGED TO KEEP AND MAINTAIN ADEQUATE RECORDS OF OWNERSHIP; (2) MAKE GOOD FAITH AFFIRMATIVE EFFORTS TO RETURN THE ASSETS TO THEIR RIGHTFUL OWNERS; AND (3) AVOID ANY CONFLICTS OF INTEREST. DEFENDANTS HAVE REPEATEDLY VIOLATED ALL THREE SETS OF FIDUCIARY OBLIGATIONS

Defendant banks hold assets deposited by Jews on the eve of the Holocaust in a constructive trust arising from the special circumstances surrounding the banks' solicitation and acceptance of the deposits, and the bank's knowledge of the tragic fate of most of the depositors.

The idea of constructive trust, or some analogous institution, exists in all civilized legal systems as a metaphor for an enhanced fiduciary obligation undertaken by a person as a result of: (1) special inducements or promises made to another; (2) a dramatic power imbalance between two participants to a transaction; or (3) the obtaining of property by knowingly participating in a wrongful act. See Torres v. $36,255.80 U.S. Currency, 25 F3d 1154 (2d Cir. 1994)(constructive trust created by representation); Zeller v. Bogue Ele. Mfg. Corp., 476 F.2d 795 (2d Cir.), cert. denied, 414 U.S. 908 (1973). As then Judge Cardozo noted: "the constructive trust is the formula through which the conscience of equity finds expression." Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378 (1919). See Restatement of Restitution (1937), ch. 7; Palmer on Restitution, supra at section 2.10.

In this case, all three bases for the establishment of a constructive trust are present. First, the property in question was obtained by defendant banks and their predecessors as a result of special inducements and promises made to prospective Jewish depositors. By enacting the Swiss Bank Secrecy Act of 1934, by cooperating in the opening of accounts in names of nominees, and by quickly merging accounts opened by Jews into anonymous consolidated custodial accounts, defendant banks made special representations concerning the attractiveness of Swiss banks as safe havens for the assets of targets of Nazi persecution. See Snepp v. United States, 444 U.S. 507 (1980)(imposing constructive trust on profits earned from breach of contract).[21]

---

[21] To the extent a constructive trust is deemed to have emerged from the express and implied representations of defendant banks, it is traditionally enforced as a matter of contract. See Farnsworth, Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract, 94 Yale L. J. 1339 (1985).

Significantly, Professor Tercier does not discuss constructive trust in his affirmation, despite Switzerland's extensive unjust enrichment jurisprudence.

Second, the relationship between the defendant banks and Jewish depositors on the eve of the Holocaust reflected a dramatic power imbalance giving rise to an enhanced duty of fair dealing. Defendants knew that the Jewish depositors who were the targets of defendants' special promises and inducements concerning the confidentiality and scrupulous honesty of Swiss banks were in desperate need as targets of Nazi persecution. Moreover, as the enormous magnitude of the Holocaust became fully known, defendant banks became aware that they were the sole repository of information needed to trace many of the Jewish accounts.

Under both Swiss and New York law, defendants' representations about the confidentiality and trustworthiness of Swiss banks, the dramatic power imbalance that existed between the banks and victims of Nazi persecution on the eve of the Holocaust, and the post-war recognition by defendants that they had become the principal, perhaps the only, source of information concerning the accounts of those who failed to survive the Holocaust, combined to impress a classic constructive trust on the deposited assets, calling forth a duty of scrupulous fair dealing, and absolutely forbidding defendant banks from deriving any economic advantage from retention of the deposits. Moser v. Darrow, 341 U.S. 267 (1950)(breach of fiduciary duty requires absolute disgorgement of profits flowing from breach); Beatty v. Guggenheim, 225 N.Y. 380, 122 N.E. 378 (1919)(employee who profits at expense of employer breaches a fiduciary duty and holds all profits as constructive trustee for employer); Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910 (1969)(seller trading on inside information holds profits as constructive trustee for purchaser).

Finally, the complicity of defendants in Nazi war crimes impresses yet another classic constructive trust on assets and profits traceable to knowing facilitation of crimes against humanity.[22]

Three sets of fiduciary duties flow from the recognition that defendants hold the deposited assets as constructive trustees. First, defendants were, and are, under an affirmative duty to keep and maintain adequate records permitting the ultimate return of the deposited assets to their rightful owners.

Second, defendants were, and are, under an affirmative duty to search out the true owners of the deposits in order to return the property to its rightful owners.

Third, defendants were, and are, are under an absolute duty to refrain from placing themselves in a conflict of interest relationship with the true owners of the deposited assets by profiting in any way by failing to return them.

Once again, it matters not whether one applies well-developed Swiss concepts of unjust enrichment, the New York law of restitution, tort, or contract, or customary international law norms governing the duties of fairness owed to victims of crimes against humanity, the result is the same: Defendants hold the deposited assets as constructive trustees under a strict fiduciary obligation to seek out the accounts' true owners, and to refrain from profiting at their expense. See Restatement of Restitution (1937), section 160, comment d; section 190, comment a; section 198, section a.

---

[22] For celebrated examples of the use of constructive trust to recover profits earned by the unlawful use of another's property, see Olwell v. Nye & Nessen Co., 26 Wash.2d 282, 173 P.2d 652 (1946)(constructive trust to recover profits earned by unlawful use of another's property); Edwards v. Lee's Administrator, 265 Ky. 418, 96 S.W.2d 1028 (1936)(constructive trust to recover profits earned by wrongful use of property of another). The leading New York cases are Newton v. Porter, 69 N.Y. 133 (1877)(stolen assets transferred to lawyer as attorneys fee with knowledge of theft held by lawyer in constructive trust for true owner); Fur & Wool Trading Co. v. Fox, 245 N.Y., 156 N.E. 670 (1927). See also Terry v. Munger, 121 N.Y. 161, 24 N.E. 272 (1899). For an early common law application of the principle, see Lamine v. Dorrell, 2 Ld. Raym. 1216, 92 Eng. Rep. 303 (K.B. 1705).

Defendants have made a mockery of their fiduciary status by repeatedly violating all three sets of fiduciary duties.

Having held themselves out to victims of Nazi persecution as attractive safe havens because of impenetrable secrecy and scrupulous honesty, defendants assumed a fiduciary obligation to the victims of Nazi persecution to keep and maintain adequate records required to untangle the true ownership of the deposited assets. Instead of scrupulously maintaining adequate records, defendants have destroyed crucial records in an effort to make it impossible to trace the assets.

Moreover, once the full magnitude of the Holocaust became widely known in 1945, defendants realized that many Jews who had deposited assets on the eve of the Holocaust had died at the hands of the Nazis. At that point, defendants' duties as constructive trustee obligated them to take affirmative steps to search out survivors and close relatives in order to return the assets to their rightful owners. Instead, defendants engaged in a 50 year pattern of deception, obfuscation and fraud, using Swiss bank secrecy laws as a device to hinder and prevent efforts to trace the ownership of deposited funds. Not only have defendants failed to conduct a good faith affirmative search for the true owners of the accounts, they have lied, obfuscated and connived in a 50 year effort to retain the accounts for their own unjust enrichment. In blatant disregard of their fiduciary obligations as constructive trustees, defendants cynically used the very bank secrecy laws that had initially induced Jewish depositors to resort to Swiss banks to frustrate efforts by survivors to trace the true owners of the accounts.

Finally, defendant banks placed themselves in an impossible conflict of interest setting, in violation of the first principle of fiduciary obligation. As constructive trustees, they owe an absolute duty of loyalty to the owners of the accounts, requiring defendants to affirmatively seek the true owners out in an effort to return the funds. But, under Swiss law, as long as the true owners are not found, the defendant banks will continue to enjoy the economic benefit of the assets indefinitely.[23] Thus, defendants had, and continue to have, a major financial incentive to fail in their fiduciary duty to identify deposited funds and to restore them to their true owners.

Sadly, for 50 years, greed has triumphed over fiduciary duty, rendering defendants liable for their egregious breaches of faith. Having violated their obligations as constructive trustees under Swiss law, New York law, and customary international law, defendants must disgorge all economic advantage gained from their failure to take timely and effective affirmative steps to return the assets deposited by Jews on the eve of the Holocaust to their rightful owners.

Plaintiffs anticipate that discovery will reveal the identities of numerous depositors. Even if, however, it is no longer possible to trace deposited funds to a particular owner because defendants, in violation of their duties as constructive trustees, have destroyed the necessary

[23] Under Swiss law, unclaimed deposited assets do not escheat to the government as abandoned property. Rather, once an account is dormant for ten years, a bank is authorized to destroy its records and to hold the assets in perpetuity. Plaintiffs believe that a substantial proportion of deposited assets found their way onto the balance sheets of Swiss banks through this technique. Yet other deposited accounts remained dormant, but were charged annual fees that eventually consumed the accounts. Still other accounts were closed by the nominees in whose names they had been opened, despite the bank's knowledge that the nominee was not the true owner.

records or failed to maintain the records in an adequate manner, defendant banks remain liable in damages for egregious breach of their fiduciary obligations. Under both Swiss and New York law, defendants cannot be permitted to profit from their wrongdoing.

## III.
## PURSUANT TO CUSTOMARY INTERNATIONAL LAW, AS WELL AS THE LAWS OF SWITZERLAND AND NEW YORK, A FEDERAL COURT MAY ORDER DISGORGEMENT OF UNJUST PROFITS EARNED BY DEFENDANTS IN KNOWINGLY ASSISTING IN THE CONSUMMATION OF NAZI WAR CRIMES

Plaintiffs will prove that each defendant-bank (and their predecessors) participated in crimes against humanity by repeatedly receiving looted assets and assets produced by slave labor, with full knowledge that they were consummating the commission of Nazi war crimes. By repeatedly assisting Nazi war criminals in disposing of assets looted from Jews with full knowledge that the goods had been stolen from their rightful owners under conditions amounting to crimes against humanity, and by knowingly acting as the principal financial conduit for the importation and sale of products produced by Jewish slave labor, defendant banks earned substantial profits by enabling the Nazi regime to derive massive economic benefits from their crimes against humanity.

Whether one applies customary international law, enforced as federal common law, or the laws of Switzerland or New York to defendants' conscious wrongdoing, the result is the same: Defendants are under an enforceable legal duty within the meaning of Rule 12(b)(6) to disgorge to the victims, or their representatives, all profits earned as a result of knowingly participating in the commission of war crimes.

Defendants' retained international law expert, Professor John Norton Moore, contends that plaintiffs, in seeking civil disgorgement of the substantial unjust profits earned by defendant banks and their predecessors, fail to state a judicially enforceable claim within the meaning of Rule 12(b)(6) because: (1) the defendant banks were merely providing ordinary banking services to the Third Reich; (2) it would be unfair to apply modern concepts of conspiracy and aiding and abetting to conduct occurring 50 years ago; and (3) claims sounding in violations of customary international law are not enforceable in federal courts in the absence of legislative authorization. However, Professor Moore's effort to shield defendants' knowing complicity in Nazi war crimes from judicial scrutiny cannot withstand analysis.

A. Defendants Are Alleged to Have Violated Customary International Law as Understood and Applied by the Nuremberg Tribunal

Professor Moore asserts that defendant banks, in knowingly serving as the financial intermediary for the receipt and disposition of assets looted from Jews by the Nazis, and in knowingly trafficking in the fruits of Jewish slave labor, did not violate customary international law as it was understood in 1940-45. Since, he contends, defendants' behavior did not violate customary international law at the time the acts were performed, it would be unfair to impose retroactive criminal liability on defendants in a manner that he equates with the imposition of ex post facto laws. Moore Affirmation, at para 64-80.

But this case does not involve an effort to criminalize lawful behavior retroactively. In the first place, plaintiffs do not seek criminal sanctions. They seek merely the disgorgement of unjust profits earned by knowingly participating in, and consummating, criminal acts by Nazis that everyone agrees were violations of law. United States v. Tull, 481 U.S. 412, 423-25 (1987)(distinguishing between disgorgement and punishment).

Thus, even if it would violate norms of fairness to impose criminal sanctions on someone, like defendants, who claim to have believed that their complicitous activities were lawful[24], no similar norms guarantee defendants the right to retain unjust profits earned by knowingly assisting others in the consummation of behavior everyone knew was a crime. Quite simply, Professor Moore has improperly conflated the ex post facto norms of criminal law and the norms governing equitable restitution.

In 1940, as now, a knowing trafficker in stolen goods was, and is, civilly liable to the victim for his unjust profits, whether or not he would be criminally liable as well. Eg. Newton v. Porter, 69 N.Y. 133 (1877); Fur & Wool Trading Co. v. Fox, 245 N.Y. 215, 156 N.E. 670 (1927); Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910 (1969). Moreover, in 1940, as now, the civil liability of a knowing receiver of stolen property to account to the owner for his unjust profits was, and is, the law in every civilized legal system.

Even more importantly, the customary international law norms asserted by plaintiffs in these cases were in effect in 1945. In fact, they track the norms articulated and applied by the Nuremberg Tribunal in 1949 in convicting the President of the Dresdener Bank, Karl Rasche. United States v. Ernest von Weizsaecker, XIV Trials of War Criminals 314, 774 (1950).[25]

---

[24] The Supreme Court has rejected similar non-retroactivity arguments in the context of egregious behavior that violates the United States Constitution. Screws v. United States, 325 U.S. 95 (1945).

[25] The Rasche trial was conducted by an American military tribunal acting under the authority of Control Council Law No. 10, promulgated by the allies to provide for uniform prosecution of Nazi war criminals in the period following the initial Nuremberg prosecution by the International Tribunal. The norms applied in a Control Council 10 proceeding were identical to the norms governing the initial Nuremberg trial. See Matthew Lippman, The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied

Professor Moore, citing the acquittal of Karl Rasche on certain charges argues that the Nuremberg Tribunal was reluctant to convict German bankers for engaging in ordinary commercial banking activities with Nazis, even when those banking activities knowingly furthered the Nazi regime. Moore Aff., at para. 99(c)(i). But Professor Moore overlooks the fact that the very Nuremberg Tribunal that acquitted Karl Rasche for making ordinary loans to the Third Reich, convicted him for knowingly trafficking in assets looted from Jews, and sentenced him to seven years in prison. United States v. Ernest von Weizsaecker, XIV Trials of War Criminals 314, 611, 621, 772-783 (1950). Indeed, a dissenting Nuremberg judge criticized the Rasche conviction, arguing that it rested on little more than actions of a banker in knowingly receiving looted property. Id at 940-41.[26]

Moreover, in convicting an official of the Reichsbank, Emil Puhl, the Nuremberg Tribunal explicitly held that knowingly receiving property looted from Jews as part of the plot to exterminate them constituted participation in a crime against humanity. The Tribunal stated:

> It would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he who knowingly took part in disposing of the loot must be exonerated and held not guilty as a participant in the murder plan. Without doubt all such acts are crimes against humanity and he who participates therein is guilty of a crime against humanity. (emphasis added). Trials of Nuremberg, vol XIV, at 611 (Puhl)(emphasis added)[27]

---

Germany, 3 Ind. Int'l & Comp. L. Rev. 1 (1992).

[26] Defendants' voluminous Exhibits omit the Rasche dissent. A copy will be made available to the Court.

[27] Once again, defendants' voluminous Exhibits omit the Puhl conviction. A copy will be provided to the Court. Professor

Throughout his affirmation, Professor Moore attempts to characterize defendants' behavior as ordinary "commercial banking transactions". Moore Aff., at para 106; 119. Defendants even seek to analogize their wartime behavior to a bank that finances a cigarette company.[28] Such financing, defendants note, does not violate the law, even though the bank knows that cigarettes result in death.

But defendants overlook the critical fact that manufacturing cigarettes is a lawful activity; looting property from Jews both before and after placing them in extermination camps; and enslaving Jews as a prelude to murdering them, is not. Thus, it borders on intellectual dishonesty to characterize defendants' behavior as ordinary commercial banking transactions. Ordinary banking services simply do not include knowingly participating in the commission of an ordinary crime, much less a crime against humanity.

Plaintiffs do not seek to impose liability on defendants for making loans, or for accepting ordinary deposits. Plaintiffs' "looted assets" claims are based on allegations of defendants' repeated actions in earning substantial profits from knowingly receiving stolen goods with knowledge that they had been looted from Jews under conditions that sink to the level of war crimes and crimes against humanity. Plaintiffs' "slave labor" claims are, similarly, not based on ordinary commercial banking transactions. They are based on defendants' repeated actions in earning substantial profits from knowingly acting as the vendor and/or financial conduit for

---

Moore's affirmation does not mention the Puhl conviction. See Id at 609-619

[28] Defendants' Memorandum of Law in Support of Partial Motion to Dismiss Common-Law and Swiss Claims for Failure to State a Claim, at 4, n.7.

products that they knew were being produced by Jewish slave labor under conditions that sink to the level of war crimes and crimes against humanity.

Of course, Professor Moore may believe defendants' protestations that they did not know what they were doing when they repeatedly earned substantial sums by acting as international fences for Nazi stolen goods, or as the conscious purveyors of goods produced by slave labor. If one assumes lack of notice on the part of defendant banks, defendants' actions would not give rise to a claim for equitable disgorgement of unjust profits. But Professor Moore's conceded lack of first-hand knowledge, and his status as a paid consultant to defendants, hardly qualifies him to give an expert opinion on defendants' state of mind. Determining whether defendants possessed guilty knowledge is an issue of fact that must await subsequent development. At this stage of the proceedings, plaintiffs good faith allegations that defendants repeatedly acted with notice that they were engaged in assisting Nazis in the commission of criminal acts must, as Professor Moore concedes, be taken as true.

Thus, even if one accepts Professor Moore's effort to transplant retroactivity rules from the criminal law area to settings involving disgorgement of unjust profits earned in helping another to commit a crime, defendants' knowing receipt of looted assets clearly violated the norms of customary international law as those norms were understood and applied by the Nuremberg Tribunals in convicting bankers like Karl Rasche and Emil Puhl.

B. Individuals May Invoke Customary International Law Against Corporations Guilty of Participating in Crimes Against Humanity

Professor Moore asserts several additional objections to characterizing the defendant banks' wartime behavior as a violation of customary international law. First, he argues, since the defendant banks were performing as private actors, they are not subject to customary international law, which, according to Professor Moore, applies almost exclusively to state actors. Moore Aff. at para 108-113. Professor Moore immediately qualifies his assertion, however, by conceding that customary international law outlaws piracy by private individuals, and did so between 1940-45. Such a concession is, of course, completely consistent with the decision of the Nuremberg Tribunals to try numerous private individuals, as well as government actors, for violating customary international law.

In any event, since the bank defendants herein were not acting alone, but in repeated and close concert with officials of Nazi Germany, their legal status is not that of a purely private actor. While Professor Moore's international law credentials are impressive, he has obviously not studied the American precedents on state action which hold that when a private actor knowingly participates with a government official in the commission of an unlawful act, the private actor acts under color of law, and exercises state action. Eg. Adickes v. Kress & Co., 398 U.S. 144 (1970); Dennis v. Sparks, 449 U.S. 24 (1980); Tower v. Glover, 467 U.S. 914 (1984); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Batson v. Kentucky, 476 U.S. 79 (1986). See Albert v. Carovano, 824 F2d 1333 (2d Cir. 1987).

Moreover, Professor Moore's assertion that customary international law does not govern the activities of private actors is particularly unpersuasive when measured against the law of this

Circuit. In Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995), this Circuit explicitly rejected the notion that customary international law does not bind private individuals. In this Circuit, Professor Moore's invocation of Judge Edward's concurrence in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) is merely of academic interest.

Professor Moore then makes the extraordinary assertion that, in 1945, customary international law norms were, ordinarily, not enforceable by private individuals. Moore Aff. at para. 114-117; 150-155;; 163-164. Accordingly, he argues that plaintiffs, as private persons, cannot invoke the Rasche, or Puhl precedents in support of a claim for equitable restitution.

Given the Supreme Court's historic invocation of customary international law on behalf of private persons in La Paquette Habana, 175 U.S. 677 (1900), Professor Moore's assertion that customary international law does not protect private individuals is puzzling. In fact, long before anyone dreamed the nightmare of Nuremberg, American courts had ruled repeatedly that customary international law norms are enforceable by private individuals in civil settings. Eg. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Respublica v. De Longchamps, 1 U.S. (Dall.) 111, 114 (1784); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 161 (1795); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 36 (1801); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815); The Nereid, 13 U.S. (9 Cranch) 388, 423 (1815); La Paquette Habana, 175 U.S. 677 (1900).

Professor Moore never explains why the customary international law norms recognized by the Nuremberg Tribunal and applied in the Rasche and Puhl cases should give rise solely to criminal liability when, for at least 150 years, customary international law had been understood to give rise to civil as well as criminal remedies.

Moreover, in this Circuit at least, Professor Moore's assertions have been soundly and repeatedly rejected. In Filartiga v. Pena-Irala, 630 F.2d 896 (2nd Cir. 1980), and Kadic v. Karadzic, 70 F3d 232 (2d Cir. 1995), this Circuit firmly ruled that private persons may invoke the protection of customary international law in a civil proceeding for damages when, as here, the challenged conduct is alleged to violate customary international law norms recognized by the Nuremberg Tribunals.

Professor Moore, by inexplicably citing only one-half of the verdict in Rasche, and ignoring the verdict in Puhl completely, argues that defendants' actions in knowingly and repeatedly acting as a receiver of stolen property on behalf of the Nazis did not violate the Nuremberg Principles, and, therefore, do not fall under Filartiga and its progeny. Moore Aff. at para 154. But, if the Rasche conviction is considered, and if the Puhl conviction is not ignored, it seems clear that plaintiffs are seeking relief for actions that have already been found by the Nuremberg Tribunals to have violated customary international law. Accordingly, the customary international law norms invoked by plaintiffs fall comfortably within Filartiga and Kadic.

Finally, Professor Moore makes the genuinely remarkable assertion that it would be unfair to punish current shareholders of the defendant banks for the unlawful acts of individual bank officials committed many years ago. Moore Aff., at para. 28. But the reality is that, unless the defendant banks are required to disgorge the unjust profits they earned by knowingly participating in the commission of Nazi war crimes and crimes against humanity, the banks (and their shareholders) will be unjustly enriched by the retention of profits they should never have earned. In effect, Professor Moore's assertion that corporate shareholders should not be forced to suffer merely because corporate officials earned substantial sums for the corporation by knowingly participating in criminal activity would insulate corporations from the reach of domestic laws and international treaties prohibiting bribery, discrimination and pollution of the environment. In my years of experience as a civil rights lawyer and scholar, I have never experienced a setting where a corporation was deemed immune from disgorging unjustly earned profits because shareholders might suffer.

### C. Customary International Law, as Articulated and Enforced by the Nuremberg Tribunal, is Judicially Enforceable as an Integral Part of the Federal Common Law

Professor Moore appears to argue, as well, that even if defendants' activities are viewed as violating customary international law as it was applied by the Nuremberg Tribunals in 1945, plaintiffs may not enforce Nuremberg customary international law norms in an American court without legislative authorization. Moore Aff., at para 163-166.

Professor Moore's assertions concerning the enforceability of clearly established customary international law norms in an American court are inconsistent with the great weight of judicial authority and academic opinion, especially in this judicial Circuit. In fact, the fundamental customary international law norms at issue in this case that arise out of the Nuremberg Charter are an integral part of the federal common law and, therefore, fully enforceable in an American court.[29] La Paquette Habana, 175 U.S. 677 (1900). See John Norton

---

[29] Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1 (1982); David Luban, The Legacies of Nuremberg, 54 Soc. Res. 779 (1987). See also Sandra Day O'Connor, The Federalism of Free Nations, 28 N.Y.U. Journal of Int'l Law and Politics, 35 (1996)(citing La Paquette Habana with approval, and urging recognition of Immanuel Kant's aspiration for world law

Moore, Federalism and Foreign Relations, 1965 Duke L. J. 248, 268-75 (Sabbatino establishes that customary international law is federal common law).

Professor Moore treats customary international law as though it were an esoteric concept, foreign to American jurisprudence. In fact, customary international law, defined as "general principles common to the major legal systems of the world", and the "general and consistent practice of states followed by them from a sense of legal obligation"[30] is an integral part of post-Erie v. Tompkins federal common law, and, as such, is fully enforceable in an American court. See, eg., Filartiga v. Pena-Irala, 630 F.2d 896, 887 n.20 (2d Cir. 1980)("International law has an existence in the federal courts independent of acts of Congress...); Kadic v. Karadzic, 70 F3d 232, 246 (2d Cir. 1995)(referring to "settled proposition that federal common law incorporates international law"), cert. denied, 116 S.Ct. 2524 (1996); In re Estate of Ferdinand Marcos Human Rights Litig., 978 F2d 493, 502 (9th Cir. 1992)("It is well settled...that the law of nations is part of the federal common law"); Ishtyaq v. Nelson, 627 F. Supp. 13, 27 (E.D.N.Y. 1983)("[I]nternational law is a part of the laws of the United States that federal courts are bound to ascertain and apply in appropriate cases"); United States v. Feld, 514 F. Supp. 283, 288 (E.D.N.Y. 1981)(customary international law part of "our domestic law"); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995)("[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law"). See Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of

---

reflecting the "federalism of free nations").

[30] See Restatement of Foreign Relations (Third)(n. 2 to Preface) section 102(1)(c).

the Modern Position, 110 Harv. L. Rev. 816 (1997)(criticizing the Second Circuit's position, but acknowledging that it is "entrenched" in modern law).

Professor Moore's views on the enforceability of customary international law in an American court appear to reflect the views of then-Judge Robert Bork, concurring in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984)(Bork, J. concurring). Judge Bork's views were rejected, however, by his two fellow judges (726 F.2d at 776 (Edwards, J.); and 726 F.2d 826 (Robb, J.), and have been severely criticized by the academic community. Anthony D'Amato, What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken, 79 Am. J. Int'l Law 92 (1985). More importantly, Judge Bork's views have been resoundingly rejected by the Second Circuit. Filartiga v. Pena-Irala, 630 F.2d 896 (2nd Cir. 1980); Kadic v. Kardzic, 70 F.3d 232 (2nd Cir. 1995).

Thus, while Professor Moore's personal opinion on the judicial enforceability of settled customary international law norms arising out of the Nuremberg Tribunal is entitled to respectful attention, he appears to be urging a highly contested position in tension with his supposed role as an expert, and inconsistent with the settled law of this Circuit. The "entrenched" position of modern courts and the contemporary academic commentary, especially in this Circuit, conflicts sharply with Professor Moore's assertions.[31]

---

[xx] The Supreme Court has repeatedly acknowledged the enforceability of customary international law in an American court without the necessity of legislation. John Jay, speaking as the first Chief Justice, noted that "the United States, by taking a place among the nations of the earth [became] amenable to the law of nations". Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793). Justice Gray, speaking for the Court in La Paquette Habana, 175 U.S. 677 (1900), which applied customary international law to exempt coastal fishing vessels from capture,

Under current Second Circuit law and practice, if a defendant is alleged to have violated basic humanitarian tenets of customary international law (with the norms enunciated by the Nuremberg Tribunals serving as the paradigm), the customary international law norm is recognized as an integral part of the federal common law. Filartiga v. Pena-Irala, 630 F.2d 896(1980); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). As federal common law, the customary international law norm is enforceable in a federal court without the need of additional legislative authorization. See Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 890 (1986). Finally, subject matter jurisdiction over a customary international law claim arising under federal common law exists pursuant to both 28 U.S.C. 1331, and 28 U.S.C. 1350. See Harold Hongjiu Koh, Transnational Public law Litigation, 100 Yale L. J. 2347 (1991).

Since defendants are alleged to have knowingly received stolen property looted from Jews under circumstances that constitute war crimes and crimes against humanity, Rasche and Puhl explicitly hold that the banks' knowing conduct violated customary international law as

---

stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination".

See also, The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815)(law of nations is part of "the law of the land"). Most recently, the Supreme Court acknowledged the enforceable nature of customary international law by observing that international law is "part of our law". First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983).

explicitly recognized and applied by the Nuremberg Tribunals. Since such a basic customary international law norm is recognized as an integral part of the federal common law, it is enforceable in federal court in a civil action for equitable disgorgement. Finally, since plaintiffs' claim arises under federal common law (as well as the law of nations), subject matter jurisdiction is conferred by 28 U.S.C. 1331, and 1350.

D. Customary International Law, as Federal Common Law, is Routinely Enforceable by Orders of Restitution and Disgorgement

Professor Moore suggests that the customary international law norms recognized at Nuremberg may not be enforced through orders of restitution and disgorgement. Moore Aff., para. 108-111. But he ignores two crucial precedents. First, the Nuremberg Charter itself explicitly provided for restitution as one of the goals of the international tribunal. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284. Indeed, numerous orders of restitution were issued by the Nuremberg Tribunal and its affiliated entities. See, eg., Benjamin B. Ferencz, Less than Slaves: A Sequel to Hitler's Holocaust, the Story of Jewish Forced Labor (1979), at 34-35, 66 (I.G.Farben); 71-72, 86 (Krupp); 158, 170 (Flick); 127 (Siemens); 153 (Rheinmetall).

Moreover, in 1792, the very first example of the enforcement of customary international law in an American court involved an order of equitable restitution to a slave owner for losses suffered in violation of the law of nations.

In fact, an order requiring disgorgement of unjust profits earned by knowingly assisting in the commission of a crime is an equitable remedy available under all three potential sources of law in this case. Disgorgement of unjust profits earned by knowingly facilitating a crime is a well developed facet of Swiss unjust enrichment law. See Dawson, Negotiorum Gestio: The Altruistic Intermeddler, 74 Harv. L. Rev. 817 (1961) (distinguishing between "conscious" and "unconscious" wrongdoers).[32]

Similarly, New York requires wrongdoers to disgorge profits earned as a consequence of their wrongdoing. Eg. Newton v. Porter, 69 N.Y. 133 (1877); Fur & Wool Trading Co. v. Fox, 245 N.Y. 215, 156 N.E. 670 (1927); Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910 (1969).

Not surprisingly, equitable disgorgement is also routinely available in federal court as a means of enforcing federal common law, of which customary international law is an integral part. Snepp v. United States, 444 U.S. 507, 515 (1980)(granting disgorgement to enforce federal common law of contract); Zacchini v. Scripp-Howard Broadcasting Co., 433 U.S. 562 (1977)(requiring disgorgement of profits from misappropriation of intellectual property); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972)(requiring bank to disgorge unjust profits); SEC v. First Jersey Securities, Inc., 101 F.3d 1450 (2d Cir. 1996)(explaining equitable doctrine of disgorgement in context of securities litigation); Janigan v. Taylor, 344 F2d 781 (1st Cir. 1965)(discussing policy behind disgorgement of unjust profits). See generally Friendly, In Praise of Erie - And the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964).

E. Under the Laws of Switzerland and New York, Defendants Are Under a Duty to Disgorge Profits Earned by Knowingly Participating in a Criminal Enterprise

---

[32] For the purposes of this Rule 12(b)(6) motion, defendants must be deemed conscious wrongdoers in light of plaintiffs' allegations that defendants acted with full knowledge that they were facilitating war crimes.

Plaintiffs' claim for equitable disgorgement of profits earned by trafficking in the fruits of criminal activity also states a claim under both Swiss and New York law.

New York law forbids a bank to knowingly assist in the commission of a crime. Moreover, equitable disgorgement of unjust profits earned by facilitating the commission of a wrong is a well recognized remedy under New York law. For example, in Newton v. Porter, 69 N.Y. 133 (1877), bearer bonds were stolen and transferred to a lawyer in payment for services rendered. The lawyer accepted the bonds knowing that they had been stolen. The lawyer then sold the bonds at a profit. In a pioneering decision, the New York Court of Appeals ruled that, in order to prevent a wrongdoer from obtaining unjust enrichment, the lawyer held the proceeds of the sale of the bonds, including any profit, in constructive trust for the true owner. Similarly, in Fur & Wool Trading Co. v. Fox, 245 N.Y 215, 156 N.E. 670 (1927), furs were stolen, and then sold to a party who was on notice of the theft. The New York Court of Appeals ruled that, to prevent unjust enrichment of a wrongdoer, the purchaser held the furs, and any profits earned on them, in constructive trust for the true owner. In Diamond v. Oreamuno, 24 N.Y2d 494, 248 N.E.2d 910 (1969), the New York Court of Appeals ordered a defendant charged with insider trading to disgorge his profits to sellers. See also Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889)(murderer may not profit from wrongdoing by inheriting under his victim's will).

Just as the wrongdoers in Newton, Fur and Wool Trading Co., Diamond, and Riggs were required to disgorge all profits earned as a consequence of their wrongdoing, so the defendant banks are required under New York law to disgorge profits earned by knowingly facilitating the commission of Nazi war crimes.

Swiss law parallels both New York and customary international law by forbidding a bank to knowingly assist in the commission of a crime. Swiss banks may not knowingly launder assets derived from criminal activity, or knowingly operate as receivers of stolen property. Moreover, the Swiss law of unjust enrichment requires a wrongdoer to disgorge profits traceable to his wrong.

Thus, whether one applies Swiss, New York, or customary international law to defendants' behavior in knowingly facilitating Nazi war crimes by laundering the fruits of the crimes into cash, the following legal principles are clear: (1) defendant banks and their predecessors repeatedly violated the law in knowingly assisting in the commission of blatantly unlawful acts by Nazi war criminals by trafficking in the fruits of war crimes and laundering them into cash; (2) defendants earned substantial sums as a direct result of their wrongful conduct; (3) defendants are bound to disgorge their ill-gotten profits to the victims of Nazi war crimes, or to their lawful representatives; and (4) defendants' duty to disgorge is fully enforceable in this Court as a matter of federal common law, or as an application of Swiss or New York law.[33]

## IV.
## SUBJECT MATTER JURISDICTION EXISTS OVER EACH OF

---

[xx] Under established law, defendants are also liable for the return of specific items of looted assets that they knowingly laundered, or for their current value. Such "specific restitution" liability may turn on the ability to trace specific assets to a particular bank. Accordingly, it is premature to consider it at length prior to discovery. Since discussion of liability for the return of looted assets is premature, I have concentrated on the defendants' unquestionable duty to disgorge profits earned by assisting in the commission of war crimes, which does not turn on an ability to identify specific assets.

PLAINTIFFS' CLAIMS FOR RELIEF

In Point I, plaintiffs have established the existence of legally enforceable claims for relief falling into three broad categories: (1) "deposited assets" claims for the return of property placed for safekeeping in defendant banks, or their predecessors, on the eve of the Holocaust; (2) "constructive trust" claims for damages and restitution flowing from defendants' violation of their fiduciary duties as constructive trustees by failing to keep and maintain adequate records, by failing to take adequate affirmative steps to return the deposited assets, and by enriching themselves at plaintiffs' expense; and (3) "looted assets/slave labor" claims for disgorgement of all profits earned by defendant banks, and their predecessors, through knowingly assisting the Nazis in disposing of looted assets and goods produced by slave labor.

Plaintiffs claims for the return of deposited assets, and for the breach of duties of constructive trust, arise under the laws of New York and Switzerland.[34] Accordingly, subject matter jurisdiction over the deposited asset and constructive trust claims is present pursuant to 28 U.S.C. section 1332, regardless of whether the claims ultimately sound in contract, tort, or unjust enrichment.[35]

---

[34] The sole exception is the existence of a customary international law claim against defendants for breach of constructive trust in failing to carry out duties owed to the victims of crimes against humanity. Since the constructive trust claim is so clearly supported by Swiss and New York law, plaintiffs will not stress the customary international law claim for breach of constructive trust.

[35] To the extent plaintiffs' constructive trust claims rest on customary international law, they arise under federal common law, with subject matter jurisdiction flowing from 28 U.S.C. section 1331 and 28 U.S.C. section 1350.

Plaintiffs' looted assets/slave labor claims for the disgorgement of unjust profits earned by defendant banks in knowingly trafficking in the fruits of war crimes arise under customary international law, as well as the laws of Switzerland and New York. To the extent the looted asset/slave labor claims for disgorgement arise under customary international law, subject matter jurisdiction is granted by 28 U.S.C. section 1331, since customary international law is an integral part of federal common law. Subject matter jurisdiction over plaintiffs' customary international law claims is also granted by 28 U.S.C. section 1350. To the extent that plaintiffs' looted asset/slave labor claims arise under the laws of Switzerland or New York, subject matter jurisdiction is granted by 28 U.S.C. section 1332.

Plaintiffs also invoke 28 U.S.C. section 1367, if necessary, to permit the court to resolve this entire case or controversy by asserting ancillary jurisdiction over aspects of the controversy that may not fall within a specific grant of subject matter jurisdiction, but which arise out the same "common nucleus of operative facts".[36]

A. Diversity Jurisdiction Exists Over the "Deposited Assets" and "Constructive Trust" Claims Pursuant to 28 U.S.C. sec. 1332

Plaintiffs invoke classic alien diversity jurisdiction under 28 U.S.C. sec. 1332. The three defendants banks, as well as the Swiss Bankers Association, are citizens of Switzerland within the meaning of Section 1332. Eleven of the thirteen named-plaintiffs are either citizens or residents[37] of the United States. Accordingly, as between the United States plaintiffs and the Swiss defendants, classic alien diversity exists.

---

[36]Congress' principal purpose in codifying ancillary jurisdiction was to enable a Federal District Court to resolve an entire case or controversy without requiring redundant piecemeal litigation in numerous fora. Thus, while plaintiffs do not believe that resort to 28 U.S.C. section 1367 will be necessary, it exists as a jurisdictional safety-net granting the Court power to resolve this entire case or controversy in an efficient and just manner. See also Kokkonen v. Guardian Life Ins. Co., 114 S.Ct. 1673 (1994)(1367 does not eliminate non-statutory ancillary jurisdiction).

Defendants mount two challenges to 1332 jurisdiction. First, they argue that since two named plaintiffs, and a significant number of putative members of the plaintiff-class, are citizens of foreign countries, "complete diversity" does not exist within the meaning of section 1332. Second, they argue that each individual plaintiff, including each member of any putative plaintiff-class, must satisfy the $50,000 jurisdictional amount applicable to this case.[38] Neither objection can withstand analysis.

1. Appropriate Diversity Exists

It is true, of course, that alien diversity jurisdiction does not extend to a suit by one alien against another. Hodgson v. Bowerbank, 9 U.S. (Cranch) 303 (1809). It is also true that, under the rule of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), section 1332 must be read as requiring complete diversity between the parties. Thus, the presence of alien parties on both sides of the case may, under certain circumstances, affect the ability to invoke sec. 1332. But, unless the non-diverse party is deemed indispensable within the meaning of Rule 19, the appropriate response to defendants' objection is to dismiss the non-diverse parties, not the entire complaint.

---

[37] For the purposes of assessing diversity jurisdiction, permanent resident aliens are deemed citizens of the states in which they reside. See Singh v. Daimler-Benz AG, 9 F3d 303 (3d Cir. 1993)(1332 jurisdiction exists over action by permanent resident alien against German corporation and American subsidiary).

[38] The World Council plaintiffs must satisfy a $75,000 jurisdictional amount.

Moreover, where, as here, the alien plaintiffs are in a position to invoke independent bases of jurisdiction under 28 U.S.C. secs 1331 and 1350 in connection with the constructive trust and looted assets/slave labor claims, they should be permitted to remain as 1332 plaintiffs in connection with the deposited assets claim under a grant of ancillary jurisdiction pursuant 28 U.S.C. 1367. Where alien plaintiffs litigating claims that arise out of the same "common nucleus of operative facts" as the 1332 claim within the meaning of United Mine Workers v. Gibbs, 383 U.S. 715 (1966), will remain in the case regardless of 1332, considerations of efficiency and fairness that underlie section 1367 call for retaining the alien plaintiffs under ancillary jurisdiction. Singh v. Daimler-Benz AG, 9 F3d (1993). Indeed, under Singh, the presence of a single United States citizen-plaintiff is sufficient to vest the Court with ancillary jurisdiction over the remaining alien plaintiffs.[39]

At an absolute minimum, even if the non-diverse alien plaintiffs are dismissed, the remaining United States plaintiffs may serve as class representative of a class of plaintiffs seeking recovery of deposited assets, which may include aliens without disturbing complete diversity. Under the rule of Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921), which was codified by Congress when it enacted 1367, the citizenship of a plaintiff class invoking diversity jurisdiction is measured by the citizenship of the named representative. In re "Agent Orange" Prod. Liab. Litig., 818 F2d 145, 162 (2d Cir. 1987), cert. denied 488 U.S. 1004 (1988).

---

[39]Since the rule of complete diversity set forth in Strawbridge v. Curtiss is not constitutionally required, Congress is empowered to authorize 1332 jurisdiction in a "minimum" diversity" setting, where the interests of efficiency and justice would be served by hearing an entire case or controversy. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967). That is precisely what Congress did when it enacted 1367.

In Ben Hur, the Supreme Court ruled that the presence of non-diverse parties as members of a plaintiff class does not destroy complete diversity, as long as the class is headed by a named plaintiff with appropriately diverse citizenship. Defendants' complain about the Ben Hur rule, but can cite no authority supporting its erosion. In fact, the Ben Hur rule is deeply embedded in federal law. For 75 years, it has been the mechanism by which unincorporated associations, such as labor unions, participate in diversity actions in the federal courts as both plaintiffs and defendants. Indeed, the predecessor to Rule 17 FRCP was designed to assure that state law would not defeat the Ben Hur rule. Thus, to the extent that alien plaintiffs seeking return of deposited assets, or damages for breach of a duty of constructive trust, may not remain in the case individually pursuant to ancillary jurisdiction, they may, nevertheless, participate as members of a plaintiff class headed by United States citizens.

Finally, defendants' suggestion that the Ben Hur rule should not apply in a setting where aliens outnumber United States citizens is factually inapposite. Approximately one-half of all Holocaust survivors reside in the United States. Of the 80,000 persons who have approached counsel concerning assets in Swiss banks, the overwhelming majority are by persons residing in the United States. Thus, whatever the rule may be for a radically unbalanced class where a single United States plaintiff wags an overwhelmingly alien tail, any putative class in this case will contain an appropriate mix of United States citizens and aliens.[40]

---

[40] Defendants also suggest that since many of the claimants are close relatives of persons who died in the death camps, the appropriate measure of their citizenship is that of the decedent, not the current plaintiff. But such an argument misunderstands settled law. Actions on behalf of an estate brought by a representative of the estate are measured for 1332 purposes by the citizenship of the decedent. But once the estate is

2. The Jurisdictional Amount is Satisfied

Nor is defendants' challenge to the jurisdictional amount any more persuasive. The short answer to defendants' jurisdictional amount objection is that virtually every claimant is asserting a good faith, colorable claim in excess of $50,000.[41] As even defendants' concede, funds deposited in an interest-bearing account must include accrued interest in calculating the amount in controversy under 1332. If one assumes a modest 4% interest factor, deposits of considerably less than $10,000 in 1934 would today require repayments in excess of $50,000. When one adds a factor to account for currency fluctuation, the amounts increase to an even higher level.[42]

Moreover, to the extent plaintiffs seek damages for the willful violation of duties of constructive trust, the damages payable to each claimant will easily surpass the jurisdictional

---

terminated, a close relative suing as the heir of a decedent is the real party in interest for the purposes of measuring diversity. The cause of action passes from the estate to the heir as a chose in action, which becomes the property of the heir.

Defendants' argument that the real parties in interest in connection with slave labor and looted assets claims, as well as the deposited assets and constructive trust claims, are persons who failed to survive the Holocaust is really an insupportable argument that their claims for justice failed to survive their deaths. In fact, a decedent's claim for restitution is no different than any person's whose property was stolen, or whose work was uncompensated. The claim for relief passes through their estates to their heirs or appropriate representatives, who become the real parties in interest.

[41] St. Paul Mercury Indemnity Co v. Red Cab Co., 303 U.S. 283 (1938).

[42] The deposits herein were made in Swiss francs, a currency that has increased in value almost fourfold against the American dollar. Whether ultimate payment is made to claimants in Swiss francs, or American dollars, the real dollar value of the claimed funds must reflect the current value of the Swiss franc.

amount, especially when the potential for punitive relief is considered.

Finally, the claim for disgorgement of unjust profits earned by trafficking in the fruits of Nazi war crimes must also be factored into the jurisdictional amount. Where, as here, the claim is for equitable disgorgement, the appropriate jurisdictional amount is the amount disgorged, not the amount payable to each plaintiff.

When one cumulates the accrued value of the deposited assets, the damages payable for wilful violation of a constructive trust, and the obligation to disgorge unjust profits earned by facilitating the commission of war crimes, no doubt exists that each plaintiff has asserted a colorable claim for more than $50,000.[43]

B. Subject Matter Jurisdiction Exists Over the "Looted Asset/Slave Labor" Claims Pursuant to 28 U.S.C secs. 1331, 1332, 1350, and 1367

1. Federal Question Jurisdiction Exists Over

---

[xx] Since each named plaintiff, and each putative class plaintiff, individually satisfies the jurisdictional amount, it is unnecessary to consider whether the plain meaning of 28 U.S.C. sec. 1367 alters the rule in Zahn v. International Paper Co. 414 U.S. 291 (1973), requiring each member of a diversity class to satisfy the jurisdictional amount. While District Courts in this Circuit have been reluctant to abandon the Zahn rule despite the plain meaning of 1367, several Circuits, and the weight of academic commentary, argue that the plain meaning of 1367 undermines Zahn. See, eg., In re Abbott Laboratories, 51 F3d 524 (5th Cir. 1995); Stromberg Metal Works v. v. Press Mechanical, Inc., 77 F3d 928 (7th Cir. 1996).

If necessary, plaintiffs will urge that, pursuant to the plain meaning of 1367, as long as individual named plaintiffs satisfy the jurisdictional amount, this Court has power to consider the claims of members of a putative plaintiff class without regard to the jurisdictional amount under the rubric of ancillary jurisdiction.

Customary International Law Claims Enforceable as an Integral Part of the Federal Common Law

Plaintiffs have demonstrated claims arising under customary international law for the disgorgement of all profits earned by defendants in participating in the commission of Nazi war crimes. Federal question jurisdiction exists over such claims because they arise under federal common law.

Defendants appear to concede, as they must, that claims sounding in federal common law fall within the grant of federal question jurisdiction in 28 U.S.C sec. 1331 as a claim "arising under the laws of the United States". Illinois v. Milwaukee, 406 U.S. 91 (1972); Zschernig v. Miller, 389 U.S. 429 (1968): Clearfield Trust v. United States, 318 U.S. 363 (1943); DelCostello v. Int'l Bd. of Teamsters, 462 U.S. 151 (1983); Boyle v. United Technologies Corp., 487 U.S. 500 (1988). See Field, The Scope of Federal Common Law, 99 Harv. L. Rev. 881 (1986); Hill, The Law-Making Power of the Federal Courts, 67 Colum. L. Rev. 1024 (1967); Kramer, The Lawmaking Power of the Federal Courts, 12 Pace L. Rev. 263 (1992). Se also Restatement (Third) of Foreign Relations Law secs. 111 (comment d), 112 (comment a)(1987).

Moreover, defendants appear to concede, as they must, that the overwhelming weight of judicial authority, especially in this Circuit, holds that the customary international law norms forbidding crimes against humanity and genocide recognized by the Nuremberg Charter are an integral part of the federal common law. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir 1980); Kadic v. Karadzic, 70 F3d 232 (2d Cir. 1995), cert. denied, 116 S.Ct. 2524 (1996). See also In re Estate of Ferdinand Marcos Human Rights Litig., 978 F2d 493, 502 (9th Cir. 1992)("It is well settled...that the law of nations is part of the federal common law"); Ishtyaq v. Nelson, 627 F.

Supp. 13, 27 (E.D.N.Y. 1983)("[I]nternational law is a part of the laws of the United States that federal courts are bound to ascertain and apply in appropriate cases"); United States v. Feld, 514 F. Supp. 283, 288 (E.D.N.Y. 1981)(customary international law part of "our domestic law"); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995)("[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law"). See Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 816 (1997)(criticizing the Second Circuit's position, but acknowledging that it is "entrenched" in modern law); Crockett, The Role of Federal Common law in Alien Tort Statute cases, 14 B.C. Int'l & Comp. L. Rev. 29 (1991); Burley, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, 83 Am. Jour. Int'l Law, 461, 465 n. 16 (1989).

When one puts the two concessions together, the inevitable conclusion is that sec. 1331 vests this Court with federal question subject matter jurisdiction over plaintiffs' customary international law/federal common law claims. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987)("[A] case presenting claims arising under customary international law is a federal question"); In re Cincinnati Radiation Litigation, 874 F.Supp. 796, 821 (S.D. Ohio 1995).

Although the Second Circuit's analysis in Filartiga and Kadic forecloses the issue, the Circuit was not required to assert 1331 jurisdiction, since jurisdiction under 28 U.S.C. 1350 was present in both cases. See Filartiga, supra, at 887, n.2, and Kadic, supra, at 246. See also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779-80 n.4 (D.C. Cir. 1984)(Edwards, J., concurring). However, since Article III does not authorize suits by one alien against another, in order to uphold the constitutionality of 1350 in both Filartiga and Kadic, the Second Circuit was obliged to hold that customary international law is a "law of the United States" within the meaning of Article III, rendering sec. 1331 jurisdiction inevitable. If customary international law is a "law of the United States" for the purposes of Article III, a claim arising under customary international law, by definition, arises under a "law of the United States" for the purposes of 1331.

2. Alien Tort Jurisdiction Exists Over Plaintiffs' Customary International Law Claims

Subject matter jurisdiction over plaintiff's customary international law claims is granted, as well, by 28 U.S.C. sec. 1350, the Alien Tort Act. The gravamen of plaintiffs' disgorgement claim is that defendants knowingly participated in acts of such barbarity that the term "tort" as used in 1350 is hardly an adequate characterization. But torts they were; torts of conversion, battery, unlawful imprisonment and wrongful death.[44]

Professor Moore's principal objection to plaintiffs' invocation of 1350 jurisdiction is that it is confined to alien plaintiffs. Since, he argues, many of the plaintiffs herein are United States citizens, they may not invoke the statute. Moore Aff, at para 157. As with defendants' objections to diversity jurisdiction, however, Professor Moore overlooks the rule in Ben Hur.

---

[44] Professor Moore's suggestion, Moore Aff., at para 159, that plaintiffs may not join an alien tort claim under 1350 for disgorgement of profits earned by participating in war crimes with a contract claim under 1332 for return of the deposited assets collides with the liberal joinder policies of Rule 18 FRCP. What possible reason could there be to read the Alien Tort Act as requiring a federal court to re-import the technical pitfalls of the forms of action?

In any event, at most, Professor Moore's technical quibble about mis-joinder of a contract and a tort claim in the same proceeding would require the filing of two separate cases that would then be consolidated under Rule 42.

As I have noted in connection with the existence of diversity jurisdiction, under the rule of Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921), which was codified by Congress when it enacted 1367, the citizenship of a plaintiff class is measured by the citizenship of the named representative. In Ben Hur, the Supreme Court ruled that the presence of non-diverse parties in a plaintiff class does not destroy complete diversity, as long as the class is headed by a named plaintiff with appropriately diverse citizenship.

The Ben Hur rule is deeply embedded in federal law. For 75 years, it has been the mechanism by which unincorporated associations, such as labor unions, participated in diversity actions in the federal courts. Indeed, the predecessor to Rule 17 FRCP was designed to assure that state law would not defeat the Ben Hur rule in cases involving labor unions. Thus, to the extent that alien plaintiffs invoke sec. 1350 as a jurisdictional statute to assert valid claims under customary international law, they may represent a class of persons raising common questions of law and fact containing United States citizens.

While plaintiffs believe that United States plaintiffs may invoke 28 U.S.C. sec. 1367 to join with alien plaintiffs in prosecuting 1350 claims with a common nucleus of operative fact, especially since the United States plaintiffs may invoke independent bases of jurisdiction under 28 U.S.C. secs. 1331 and 1332, at a minimum under Ben Hur, alien plaintiffs may serve as named representatives under 1350 for a class containing United States citizens.[45]

---

[45] Plaintiffs believe that it would be preferable to acknowledge reciprocal ancillary jurisdiction under sec 1367 over the overlapping claims of United States and alien plaintiffs, since they arise out of an identical common nucleus of operative facts, and since each invokes an independent base of

3. Diversity Jurisdiction Exists Over Disgorgement Claims Arising Under Swiss or New York Law

Finally, to the extent that plaintiffs' claims for disgorgement of profits earned by facilitating the commission of Nazi war crimes arise under New York or Swiss law, subject matter jurisdiction exists under 28 U.S.C 1332, just as it exists in connection with plaintiffs' claims for the return of deposited assets, and for damages for the breach of duties of constructive trust.

## V.
## NO BASIS EXISTS TO REFRAIN FROM EXERCISING CONGRESSIONALLY MANDATED JURISDICTION OVER THIS CASE

Plaintiffs have demonstrated, first, that they assert numerous claims for which relief can be granted; and, second, that this Court is vested with subject matter jurisdiction over each claim. Nevertheless, defendants urge the Court to decline to exercise Congressionally mandated subject matter jurisdiction, arguing that the Court should abstain in favor of a private effort sponsored and financed by the Swiss Bankers Association, and headed by Paul Volcker, designed to

---

jurisdiction. Alternatively, the recognition of reciprocal overlapping classes headed by appropriate named plaintiffs under Ben Hur should permit all parties to pursue their claims in the context of a single consolidated proceeding.

If necessary, separate actions may be brought under sec. 1350 on behalf of exclusively alien named plaintiffs, and under sec. 1332 on behalf of United States named plaintiffs, with both sets of plaintiffs invoking sec. 1331, and both cases certifying reciprocal broad based classes under Ben Hur, and with all cases consolidated pursuant to Rule 42. While such complex machinations may prove necessary, plaintiffs believe that the judicious application of ancillary jurisdiction is the preferable approach.

investigate whether any funds deposited by Jews on the eve of the Holocaust remain in Swiss banks in the form of dormant accounts.[46]

In addition, defendants urge the Court to defer to an investigation into the wartime behavior of the Swiss financial community sponsored by the Swiss parliament, and to the possible creation of a voluntary "Humanitarian Fund" that will be the subject of a referendum in Switzerland some time next year. Finally, Professor Moore, reinforced by a letter from the Swiss Ambassador to the United States, urges the Court to refrain from impinging on Swiss sovereign interests by acting in derogation of Swiss bank secrecy laws.

Defendants have even implied that proceeding with the case would be inconsistent with American foreign policy and contrary to the wishes of the Executive branch.

Defendants' argument for abstention is, at bottom, that plaintiffs will receive a better quality of justice in a non-judicial forum than in this Court. With due respect for defendants' newly discovered sense of justice, that decision is for the plaintiffs to make. Defendants are hardly in a position to give advice to their victims about where to find the best quality of justice. Indeed, defendants' strenuous efforts to deflect this litigation into a non-judicial forum of their own choosing and design speaks volumes about the importance of continuing this judicial proceeding. For 50 years, defendants have avoided making restitution of assets deposited by Jews on the eve of the Holocaust, and have avoided disgorging unjust profits they earned from assisting in Nazi war crimes, by acknowledging a wish to make amends, and then deflecting the implementation phase into non-judicial fora where they could control the flow of information, and where pragmatism would triumph over principle. The only forum defendants genuinely fear is a forum of principle, open to public view, where they can neither manage the flow of information, nor inject pragmatic considerations into the decision making process.

---

[46] Plaintiffs will refer to the Commission by its popular name, the Volcker Commission.

### A. Federal Courts May Not Abstain in Favor of Private Investigations That Are Financed by Defendants, and Deemed Inadequate By Plaintiffs

#### 1. No Conflict Exists Between The Volcker Commission and the Vigorous Prosecution of This Litigation

No conflict exists between the Volcker Commission and the vigorous pursuit of this litigation. Plaintiffs welcome the Volcker Commission's efforts, and appreciate the willingness of persons like Paul Volcker to attempt to unravel years of duplicity and fraud. But the Volcker Commission is not an adequate substitute for this judicial proceeding.[47]

The stated purpose of the Volcker Commission is to conduct an audit of Swiss banks to determine whether unclaimed funds exist that are traceable to deposits made by Jews on the eve of the Holocaust. By its own terms, therefore, the Volcker Commission is not empowered to investigate the conduct of defendant banks in assisting in the commission of Nazi war crimes. Thus, the Commission has absolutely no connection to plaintiffs' looted asset/slave labor claims for disgorgement of profits earned by facilitating the commission of war crimes.

Nor is the Volcker Commission authorized to provide relief for egregious breaches of defendants' fiduciary obligations as constructive trustees in failing to keep and maintain adequate records, in failing to take adequate steps to seek out the true owners of the deposited assets, and in placing themselves in an impossible conflict of interest situation where they continue to profit financially by retaining the deposited assets. Thus, the Volcker Commission's work has little or no connection to plaintiffs' constructive trust claims for damages as a result of defendants' blatant self-dealing, and failure to take affirmative steps to return deposited assets.

---

[47] Plaintiffs are grateful to the members of the Volcker Commission for their efforts. Concerns about the scope and adequacy of the Volcker Commission's efforts are not intended to denigrate the good will of members of the Commission who are attempting to right a great historic injustice.

Even in its dealings with deposited assets, the Volcker Commission fails to provide an adequate substitute for this judicial proceeding. The Commission's principal task will be to search for dormant accounts, or accounts closed by Swiss banks for non-payment of fees. But plaintiffs believe that accounts opened in the names of nominees, and funds merged into common accounts, constituted a significant percentage of the deposited assets. Such accounts will appear as neither dormant, nor closed for non-payment of fees. Moreover, an audit of dormant accounts, or accounts closed for non-payment of fees, will not adequately disclose accounts that were improperly closed by nominees, or shifted into newly named accounts. Indeed, plaintiffs fear that the only reason the Swiss Bankers Association agreed to an audit by the Volcker Commission is the SBA's belief that an audit confined to dormant accounts would yield only a fraction of the deposited assets.

Even the search for dormant accounts by the Volcker Commission is not an adequate substitute for a judicial proceeding. First, the documents to be made available to the Commission's auditors are to be selected by the banks. Second, the Commission must act in secret. Not even its members, including Paul Volcker, will have complete access to the original records and raw materials from which its reports will be made. Third, the auditors must be chosen from Swiss firms having close business ties to the banks.

Despite the narrow scope of the Volcker Commission, and plaintiffs' concerns about its structural efficacy, plaintiffs are anxious for the Volcker Commission to succeed. Accordingly, plaintiffs are prepared to pursue vigorously those aspects of this litigation that fall beyond the scope of the Volcker Commission's investigation, while seeking to cooperate with the Volcker Commission in pursuit of our common objectives concerning the expeditious return of all deposited assets. Plaintiffs, of course, reserve the right to reject the Volcker Commission's report, and to take all appropriate steps to protect plaintiffs' rights should the Commission's efforts appear inadequate, but, at this point, there is no conflict whatever between this case and the work of the Volcker Commission.

2. The Court Lacks Power to Abstain

The Supreme Court has repeatedly ruled that federal courts are under a duty to decide cases and controversies within their Congressionally prescribed jurisdiction. Quackenbush v. Allstate Ins. Co., 116 S.Ct. 1712 (1996)("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress"); Colorado River Water Conserv. District v. United States, 424 U.S. 800, 821 (1976)("[F]ederal courts have a virtually unflagging obligation...to exercise the jurisdiction given them"); England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 415 (1976)("When a federal court is appealed to in a case over which it has by law jurisdiction, it is its duty to take jurisdiction"); Cohens v. Virginia, 6 Wheat. 246, 404 1821)(federal courts "have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not").

Despite the repeated admonitions of the Supreme Court, defendants urge this Court to decline to entertain this case and to defer to the Volcker Commission under the rubric of abstention. Under the Supreme Court's precedents, however, abstention may occur only when necessary to permit a state court to perform its judicial functions, and, then, only when a discretionary remedy is sought. Quackenbush v. Allstate Ins. Co., 116 S.Ct. 1712 (1996)(rejecting Burford abstention in action for damages).

Abstention is a narrow, federalism-based exception to the obligatory exercise of subject matter jurisdiction designed to permit state courts to perform their judicial functions free from unnecessary federal interference. See, eg., Younger v. Harris, 401 U.S. 37 (1971)(federal courts should abstain from interfering with pending state criminal prosecutions); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)(federal courts should abstain to permit state courts to resolve doubtful issues of state law that would obviate the need for constitutional adjudication); Burford v. Sun Oil Co., 319 U.S. 315 (1943)(federal courts should abstain from deciding issues of great importance to a state when unresolved issues of state law may impair their proper adjudication).[48] Contrary to defendants' suggestion, no federal court has ever abstained in favor of a private mediation effort that is sponsored, paid for, and designed by the defendants. Indeed, if a defendant can defeat or substantially delay the exercise of federal jurisdiction by the simple expedient of announcing itself ready to discuss a non-judicial resolution of the controversy pursuant to a process it designs and substantially controls, Congress' effort to prescribe subject matter jurisdiction would be vulnerable to a defendant's trump. Plaintiffs would always be forced to negotiate with defendants on defendants' terms, rather than seek justice in a court of law.

Where, as here, plaintiffs view a private mediation effort as well-intentioned but unlikely to succeed, a Court simply lacks the power to abstain. Defendants do not suggest that plaintiffs are obliged pursuant to contract to submit their claims to arbitration, or to some other form of non-judicial resolution. Absent such a consensual agreement to defer judicial consideration, however, defendants' suggestion of a court-imposed restriction on access to court is unprecedented. In effect, defendants argue for a private "act of state" doctrine that would allow foreign banks to decide when they wish to be sued in an American court.

---

[48] Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959) is a modern application of Burford abstention.

Defendants are masters of the shadows. Twice in the last 50 years, in 1946 and 1962, defendants reneged on solemn promises to make restitution of looted gold and deposited Jewish assets. Forced by aroused world opinion to make yet a third promise, defendant banks have designed a new procedure, the Volcker Commission, in which they control the flow of information, and in which they determine the relevant fields of inquiry. Plaintiffs wish the people of good will who are participating in the Volcker Commission's audit the best of luck in attempting to navigate the maze that defendants have constructed. As for plaintiffs, they wish to pursue justice on all three of their claims - deposited assets; constructive trust; and looted assets/slave labor - in an open judicial forum, where defendants do not control the flow of information; where defendants do not negotiate the questions to be asked; where the results of the investigation are open to full public view; where disputes about the facts can be resolved by an impartial arbiter; and where the capacity to enforce a judgment exists. Since the Volcker Commission is pursuing an incomplete agenda under a procedure substantially controlled by the defendant banks, even if this Court were empowered to abstain in deference to the Volcker Commission (it is not), it would be a tragic mistake to do so.

Defendants' suggestion that abstention is appropriate in deference to a Swiss parliamentary investigation borders on the frivolous. Abstention is not authorized in deference to legislative investigations taking place in this country, much less a Swiss parliamentary inquiry. Moreover, the recent observation by the director of the Swiss parliamentary inquiry that it will take 10 years to complete the investigation renders abstention an absurdity. As with every other Swiss effort to deal with riches unjustly obtained during the Second World War, a Swiss parliamentary inquiry designed to take ten years to complete is a sham.

Defendants argue, as well, that Swiss concerns about a possible collision between their bank secrecy laws and United States discovery rules should induce this Court to decline to exercise jurisdiction in deference to Swiss sovereign prerogatives. To the extent defendants claim that international law requires an American court to defer to Swiss bank secrecy law, the argument has been rejected by the United States Supreme Court. Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987)(discovery involving foreign defendants governed by FRCP, not Hague Convention or law of defendant's domicile). To the extent defendants urge dismissal for forum non conveniens, the recognition that Swiss bank secrecy law will block any effort to discover the truth in these cases argues strongly for retention of this case in a United States court. Under existing Supreme Court precedent, the availability of a forum capable of fairly processing plaintiffs' claims is a precondition to the exercise of forum non conveniens. Eg. Piper Aircraft v. Reyno, 454 U.S. 235 (1981); American Dredging v. Miller, 510 U.S. 443 (1994). As Professor Tercier's concession reveals, under Swiss law, a combination of bank secrecy and lack of discovery will render it impossible for the bulk of the plaintiffs to pursue their claims in a Swiss court. Thus, whether or not Switzerland is a democracy, and whether or not its judges are civilized is simply beside the point. Under Swiss law, plaintiffs claims must be dismissed because there is no mechanism to establish them.

The tragic irony in defendants' position appears to have escaped them. Switzerland enacted its bank secrecy laws in 1934 to attract Jewish deposits. Defendants now argue that respect for those same bank secrecy laws should cause an American court to decline to exercise Congressionally conferred subject matter jurisdiction over a case seeking to use American discovery rules to trace deposits received by defendant banks from Jews on the eve of the Holocaust.

Finally, defendants insinuate that judicial action in this case is inconsistent with United States foreign policy. It is, however, an extraordinary act of arrogance for defendant banks to lecture this Court on American foreign policy. If anything, this judicial proceeding is virtually dictated by the revelations in the Report of the U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II (the Eizenstat Report). The Eizenstat Report chronicles, indeed parallels, many of the allegations about Swiss banking complicity in Nazi war crimes that give rise to plaintiffs' looted asset/slave labor claims. If the United States government wishes to inform the Court that maintenance of this action is detrimental to our national interest, it knows the Court's address.[49]

---

[49]Defendants' efforts to cast this case as inconsistent with American foreign policy rest exclusively on a series of quotes by Under Secretary of Commerce Stuart Eizenstat extolling cooperation and criticizing confrontation as a means of resolving issues raised by the retention of wartime assets by the Swiss. Secretary Eizenstat's words were aimed at members of Congress who wished to use coercive methods to force Switzerland to disgorge. They were not intended to cast doubt on the use of the courts to resolve disputes. Only a Swiss banker would confuse confrontation with the resolution of a dispute in accordance with law.

Defendants' abstention motion is nothing less than an effort to dictate the forum in which plaintiffs may seek redress against defendants for 50 years of duplicity. The one forum defendants fear is the one forum they cannot control - an American court.

B. Forum Non Conveniens May Not Be Invoked Because Defendants Have Conceded That Swiss Courts Cannot Adequately Process Plaintiffs' Claims, and Because the Balance of Convenience Strongly Favors This Forum

If defendants cannot use abstention to deflect this case into a non-judicial forum of their own choosing and design, they seek to transfer it, pursuant to forum non conveniens, to a Swiss court where it will die a natural death. It is true, of course, that federal courts retain a narrow power under the forum non conveniens doctrine to defer to the courts of a foreign country in "rare circumstances". Piper Aircraft v. Reyno, 454 U.S. 235 (1981); American Dredging v. Miller, 510 U.S. 443 (1994). But an absolute precondition to a forum non conveniens dismissal is the existence of a foreign forum capable of granting relief to the plaintiffs.

In this case, defendants have conceded that Swiss courts lack adequate procedures to provide a forum to those plaintiffs who allege that deposits were made in a Swiss bank, but who are unable to identify the precise bank. Defendants' motion to dismiss plaintiffs' common law claims is predicated on an assertion by Professor Tercier that Swiss law provides no mechanism for such a plaintiff to pursue a legal claim in a Swiss court. Thus, in the absence of the discovery techniques available in this forum, defendants have conceded that a forum non conveniens transfer to a Swiss court is a death knell for the nine named plaintiffs, and the large body of similarly situated claimants whom they represent, who have stated a valid claim for relief, but who cannot identify a particular defendant bank at this stage of the proceedings.

Even as to the four named plaintiffs who have been able to identify a particular bank, forcing this litigation into a Swiss court would effectively terminate their claims. As Professor Moore notes, Swiss courts lack the power to force defendant banks to open their records to plaintiff discovery. Without discovery, plaintiffs are at the mercy of defendants who have spent the last 50 years refusing to return the assets in question.

Yet a third procedural obstacle in a Swiss court is the refusal of Switzerland to recognize the class action. Many of the claimants in this case are too poor to afford counsel. Indeed, as defendants note, most of the attorneys for the plaintiffs are participating without fee. Transferring the case to Switzerland would require each individual claimant to prosecute a separate action, making pro bono representation prohibitively expensive.[50] Indeed, even if they wished to do so, pro bono counsel herein cannot serve the plaintiffs in a Swiss court because of language, bar membership, and expense.

Thus, forum non conveniens is not available as a matter of law. Even if it were available, however, defendants have failed to make out a case for its invocation. First, and most importantly, the bulk of the plaintiffs reside in the United States. Almost none reside in Switzerland. In virtually every successful forum non conveniens case, American courts were confronted with plaintiffs who elected to sue in the United States instead of their home country. Piper Aircraft dealt with Scottish plaintiffs; Bhopal with Indian plaintiffs. The consequence of forum non conveniens in those cases was to require the plaintiffs to pursue their claims in their home countries.

---

[50] Defendants' suggestion that a test case be litigated in Switzerland is useless, since, while plaintiffs raise many common questions of fact and law, the existence and amount of each account must be separately determined.

In this case, many thousands of United States residents who are named plaintiffs or who have contacted counsel would be denied access to an American court.

Second, unlike the cases cited by defendants, much of the evidentiary material in this case is present in the United States, and in archives throughout Europe. While the records of defendant banks in Switzerland will, of course, be important, the archival records that paint a picture of the flow of funds into Swiss banks during the 1930's, and the records demonstrating the behavior of Swiss banks in facilitating Nazi war crimes, are not solely, or even predominantly, present in Switzerland. Indeed, much of the material is collected in the archives of the United States Holocaust Memorial Museum in Washington, D.C.

Moreover, to the extent plaintiffs' and other claimants' testimony is required, the bulk of the claimants reside in the United States. Almost none reside in Switzerland.

Finally, plaintiffs believe that a substantial proportion of the deposited assets were transferred to banks in New York State for safekeeping during the war years, and were unlawfully returned to Switzerland in violation of New York, and federal law, rendering a United States forum particularly appropriate.

Thus, even if discretion to dismiss on forum non conveniens grounds existed (it does not), defendants have not come close to establishing the preconditions for closing an American court to American residents whose claims cannot be adequately prosecuted in a Swiss court.

## VI.
## PLAINTIFFS HAVE ARTICLE III STANDING, AND PRESENT CLAIMS POSING NO UNIQUE ISSUES OF JUDICIAL

ADMINISTRATION

In a final effort to avoid judicial scrutiny, defendants argue that this case is not judicially manageable because plaintiffs lack Article III standing. In large part, defendants' standing arguments are merely replays of their contention that no plaintiff can state a legally cognizable claim under Rule 12(b)(6) unless it is directed at a particular bank. As plaintiffs have demonstrated, such a narrow view of the ability of a plaintiff to plead a case or controversy against one of several alternative defendants has been explicitly rejected by Rule 20(a) FRCP. Unless defendant argues that the relaxed pleading rules adopted by Rule 20(a) violate Article III, defendants' standing argument collapses as applied to all plaintiffs seeking the return of deposited assets, or damages for violations of defendants' duties as constructive trustees.

In fact, defendants' standing arguments are a premature challenge to possible remedial options available to plaintiffs if discovery fails disclose assets belonging to individual plaintiffs, or constructive trust damages payable to specific individuals. At that point, issues of defendants' collective liability and plaintiffs representative authority will be ripe for consideration. Plaintiffs are confident that, at the appropriate time, theories of group entitlement and collective liability will force defendants to disgorge all funds traceable to assets deposited by Jews on the eve of the Holocaust, and to disgorge any profits earned by defendant banks by facilitating the commission of crimes against humanity against the Jews of Europe during the Holocaust. Although it is premature until discovery has been completed, ample authority exists permitting plaintiffs to function on behalf of those who failed to survive, and those whose records have been destroyed or lost by the defendants. Eg. Heckler v. Mathews, 465 U.S. 728 (1984)(membership in injured group establishes Article III standing to vindicate group's rights); Powers v. Ohio, 499 U.S. 400

(1991)(recognizing standing to assert ius tertii when close relationship exists and hindrance to assertion of rights present); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)(organizational standing to sue landlord for discriminating against individuals); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977)(organization has standing to sue on behalf of its members); UAW v. Brock, 477 U.S. 274 (1986)(reaffirming organizational standing).

In the end, the issue may come down to permitting defendant banks to retain money that is not theirs' as a form of unjust enrichment, or requiring the banks to disgorge the unjust enrichment to close family members of the true owners, or, if no close family members survived, to appropriate institutional representatives of the victims for distribution to the communities from which the money was stolen. While plaintiffs are confident that no Article III impediment exists to full remedial justice in this case, consideration of such remedial issues should await completion of individual discovery, or at a minimum, a motion to certify one or more plaintiff-classes.[51]

Conclusion

For the above-stated reasons, defendants' motion to dismiss, delay, or transfer these consolidated cases should be denied in all respects.

---

[51] Defendants' Rule 19 motion claiming that indispensable parties may exist in connection with the return of specific property and accounts is clearly premature. If and when discovery identifies settings in which absent parties should be brought into Court, the flexible procedures mandated by the Supreme Court will be more than adequate to deal with any possibility of unfairness. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

Dated: June 16, 1997
New York, New York

Respectfully submitted,

Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6172
Co-Counsel for Plaintiffs

## Appendix

Since 1991, I have been the John Norton Pomeroy Professor of Law at New York University, where I have taught for the past 23 years. During my academic career, I have regularly taught Federal Civil Procedure, Federal Courts, Evidence, Separation of Powers, Constitutional Law, and Judicial Protection of Human Rights. I have published widely in the area of Constitutional Law and judicial protection of human rights. A partial listing of my publications is annexed hereto.

I have also participated directly in the courts in an effort to advance and protect human rights. I served on the legal staff of the American Civil Liberties Union for eleven years, and was its National Legal Director from 1982-86. I served as Special Counsel to the NOW Legal Defense and Education Fund from 1989-92. I was appointed to the New York City Human Rights Commission in 1988, and served until 1992. Since 1995, I have served as Legal Director of the Brennan Center for Justice at New York University Law School, and am a member of the Civil Rights Reviewing Authority of the United States Department of Education.

During my career, I have been asked by the United States government to participate in international activities designed to enhance the rule of law. Under the auspices of the State Department, I have twice traveled to Turkey to work with groups attempting to expand the concept of international human rights. At the request of the Department of Justice, I traveled to the then-Soviet Union as a member of the United States delegation to the bilateral conference on strengthening the Rule of Law. Under the auspices of the State Department, I have traveled, at one time or another, to Germany, Venezuela and Argentina to discuss the enforcement of international human rights norms in those countries. I have recently returned from a Ford Foundation sponsored visit to South Africa to confer with Justice Richard Goldstone, the former Chief Prosecutor of the Bosnian War Crimes Tribunal and a member of the South African Constitutional Court, on techniques for the effective judicial enforcement of international human rights norms. I recently benefitted from a remarkable conference held at New York University School of Law on "The Interaction Between National Courts and International Tribunals". See Sandra Day O'Connor, The Federalism of Free Nations, 28 N.Y.U. Journ. of Int'l Law and Politics 35 (1995-96)(opening address to conference).

## **Publications**

Books: El Papel de los Juristas y del Imperio de la Ley en Sociedad Americana (1995)

Free Speech Free Markets Free Choice: An Essay on Commercial Speech (1986)

Political and Civil Rights in the United States (Volume I, 1976)(with Paul Bender and

Norman Dorsen); (Volume II, 1979)(with Paul Bender, Norman Dorsen and Sylvia Law).

The Rights of Candidates and Voters (1976)(with Arthur Eisenbeg).

Unquestioning Obedience to the President (1972)(with Leon Friedman).

Articles:

Who's Afraid of the Human Rights Commission, 23 Fordham Urban L. J. 1139 (1996)

Blues for the Left Hand: A Critique of Cass Sunstein's Democracy and the Problem of Free Speech, 62 Chi. L. Rev. 423 (1995)

Speech, Technology, and the Emergence of a Tri-Cameral Media, 17 Hastings Communications and Entertainment Law Journal 17 (1994)

Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech, 27 Harv. Civ. Rights-Civ. Liberties Law Review 371 (1992)

Of Sausage Factories and Syllogism Machines: Formalism, Realism and Exclusionary Selection Techniques, 67 N.Y.U. L. Rev. 419 (1992)

Notes for a Restatement (First) of the Law of Affirmative Action: An Essay in Honor of Judge John Minor Wisdom, 64 Tulane L. Rev. 1543 (1990)

State Constitutions and the Evolution of Positive Rights, 20 Rutgers L. Jour. 881 (1989).

The First Amendment and Government Regulation of The Capital Markets, 55 Brooklyn L. Rev. 5 (1989)

Notes for a Theory of Constrained Balancing, 38 Case Western Res. L. Rev. 576 (1988)

The Role of the Legislative and Executive Branches in Interpreting the Constitution, 73 Corn. L. Rev. 375 (1988)

Equitable Estoppel, Unjust Enrichment and the Good Samaritan Doctrine: Three Possible Defenses to a Farmers Home Administration Foreclosure Proceeding, 15 N.Y.U. Rev. of Law & Social Change 313 (1987)

The Binding Effect of Judicial Precedent, 61 Tulane L. Rev. 991 (1987).

A Dialogue on the Settlement of Constitutional Cases, 2 Chi. L. Forum 177 (1987) (with F.A.O. Schwarz, Jr.).

The Nylon Curtain: America's National Border and the Free Flow of Ideas, 26 William & Mary L. Rev. 719 (1985) (with Steven Shapiro).

Judicial Review and Fundamental Rights, 26 Ariz. L. Rev. 6 (1984) (with Charles Sims).

Judicial Review and Separation of Powers in France and the United States, 57 N.Y.U. L. Rev. 363 (1982).

Toward Procedural Parity in Constitutional Litigation, 22 William & Mary L. Rev. 725 (1981).

A Rationale for the Protection and Regulation of Commercial Speech, 46 Brooklyn L. Rev. 437 (1980).

Observations on Weber, 54 N.Y.U. Law Rev. 546 (1979).

The Myth of Parity, 90 Harv. Law Rev. 1105 (1977).

The Procedural Assault on the Warren Legacy, 5 Hofstra L. Rev. 545 (1977).

Miscellaneous:

Mr. Justice Powell, an Essay, in The Justices of the Supreme Court (6th Edition).

Mr. Justice Blackmun, an Essay, in National Law Journal (1979).

Litigation Strategy, in Encyclopedia of the American Constitution (1986).

Justice Blackmun, in Encyclopedia of the American Constitution (1986).

Freedom of Expression in the United States, in The Limitation of Human Rights in Comparative Constitutional Law (1986).

Justiciability, Remedies, and the Burger Court, in The Burger Years: Rights and Wrongs in the Supreme Court (1987).

The Origin of Rights: Constitutionalism, the Stork and the Democratic Dilemma, in The Role of Courts in Society (1988)

The Supreme Court and Civil Rights in the Post-War Era, in Facts on File: United States (1990).

An Overview of the Bill of Rights, in Fundamentals of American Law (1996)